No. 16-5294 *** CAPITAL CASE ***

Title:	James E. McWilliams, Petitioner v. Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al.
Docketed:	July 20, 2016
Linked with 15A978	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(13-13906)
Decision Date:	December 16, 2015
Rehearing Denied:	February 16, 2016

Questions Presented

DATE	PROCEEDINGS AND ORDERS
Mar 16 2016	Application (15A978) to extend the time to file a petition for a writ of certiorari from May 16, 2016 to July 15, 2016, submitted to Justice Thomas.
Mar 24 2016	Application (15A978) granted by Justice Thomas extending the time to file until July 15, 2016.
Jul 15 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 19, 2016)
Aug 09 2016	Order extending time to file response to petition to and including September 19, 2016.
Aug 19 2016	Brief amicus curiae of The Constitution Project filed.
Sep 14 2016	Order further extending time to file response to petition to and including October 19, 2016.
Oct 17 2016	Brief of respondents Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al. in opposition filed.
Oct 28 2016	Reply of petitioner James E. McWilliams filed.
Nov 03 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 17 2016	Record Requested.
Nov 22 2016	Record received from the U.S.C.A. 11th Circuit. (1-Box)
Dec 06 2016	Record received from the U.S.D.C. for the Northern District of Alabama (4 boxes).
Dec 08 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
Jan 17 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the respondents.
Jan 27 2017	Motion to appoint counsel filed by petitioner James E. McWilliams.
Feb 10 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Feb 15 2017	DISTRIBUTED for Conference of March 3, 2017.

Feb 17 2017	SET FOR ARGUMENT ON Monday, April 24, 2017
Feb 27 2017	Joint appendix filed.
Feb 27 2017	Brief of petitioner James E. McWilliams filed.
Mar 06 2017	Motion to appoint counsel filed by petitioner GRANTED, and Stephen B. Bright, Esquire, of Atlanta, Georgia, is appointed to serve as counsel for the petitioner in this case.
Mar 06 2017	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 06 2017	Brief amici curiae of American Psychiatric Association, et al. filed.
Mar 22 2017	CIRCULATED.
Mar 29 2017	Brief of respondents Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al. filed. (Distributed)
Apr 17 2017	Reply of petitioner James E. McWilliams filed. (Distributed)
Apr 24 2017	Argued. For petitioner: Stephen B. Bright, Atlanta, Ga. (Appointed by this Court.) For respondents: Andrew L. Brasher, Solicitor General, Montgomery, Ala.
Jun 19 2017	Judgment REVERSED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Gorsuch, JJ., joined.
Jul 07 2017	Record returned to the U.S.C.A. 11th Circuit (1 Box).
Jul 07 2017	Record returned to the U.S.D.C. for the Northern District of Alabama (4 boxes).
Jul 21 2017	JUDGMENT ISSUED.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Stephen B. Bright Counsel of Record	Southern Center for Human Rights 83 Poplar Street, N.W. Atlanta, GA 30303-2122 sbright@schr.org	(404) 688-1202
Party name: James E. McWilliams		
Mark Aaron Loudon-Brown	83 Poplar Street NW Atlanta, GA 30303 mloudonbrown@schr.org	(404) 688-1202
Party name: James E. McWilliams		
Attorneys for Respondents		
Andrew L. Brasher Counsel of Record	Solicitor General Office of Attorney General 501 Washington Avenue Montgomery, AL 36130 abrasher@ago.state.al.us	(334) 353-2609
Party name: Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al.		

Henry M. Johnson	Assistant Attorney General 501 Washington Avenue P.O. Box 300152 Montgomery, AL 36130-0152 hjohnson@ago.state.al.us	(334) 242-7300

Party name: Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al.

Other

Michael B. DeSanctis	Jenner & Block LLP 1099 New York Ave., NW, Suite 900 Washington, DC 20001 mdesanctis@jenner.com	(202) 636-6000

Party name: The Constitution Project

George H. Kendall	Squire Patton Boggs (US) LLP 30 Rockefeller Plaza 23rd Floor New York, NY 10112 george.kendall@squirepb.com	(212) 872-9800

Party name: The National Association of Criminal Defense Lawyers, et al.

Aaron M. Panner	Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, N.W. Suite 400 Washington, DC 20036-3215 apanner@kellogghansen.com	(202) 326-7900

Party name: American Psychiatric Association, et al.

RECORD AND BRIEFS

No. 16-5294

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 15 2016
OFFICE OF THE CLERK

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner James E. McWilliams, by and through undersigned counsel and pursuant to Supreme Court Rule 39, respectfully requests leave to proceed *in forma pauperis*. McWilliams is filing a petition for writ of certiorari simultaneously with this Motion, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's denial of McWilliams's petition for a writ of habeas corpus. Although McWilliams was found indigent and

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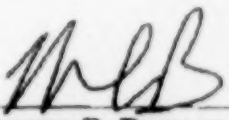
appointed counsel to represent him in the trial court, leave to proceed *in forma pauperis* has not previously been sought in this matter.

McWilliams has been incarcerated on death row at Holman Correctional Facility ever since his conviction and death sentence in 1986. Attachment A is the notarized Affidavit Accompanying Motion for Permission to Appeal *in Forma Pauperis*.

WHEREFORE, Mr. McWilliams respectfully requests that this Court grant him leave to proceed *in forma pauperis*.

Respectfully submitted, this 15th day of July, 2016.



STEPHEN B. BRIGHT
MARK LOUDON-BROWN
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
mloudonbrown@schr.org

ATTACHMENT A

UNITED STATES SUPREME COURT

James Edmond McWilliams, Jr.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. _____
Jefferson S. Dunn, Commissioner,	)	
Alabama Department of Corrections, et al.,	)	
	)	
Respondent.	)	

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: James C. McWilliams

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 13 Feb 2018

My issues on appeal are:

See attached petition

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	$ 0
N/A	N/A	N/A	$ NONE
N/A	N/A	N/A	$ 0

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	$ 0
			$ 0
N/A	N/A	N/A	$ 0

4. *How much cash do you and your spouse have?* $_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
SEE ATTACHMENT	Prison	$ 0	$ 0
N/A	N/A	$ 0	$ 0
N/A	N/A	$ 0	$ 0

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	Other real estate	Motor vehicle #1
(Value) $	(Value) $	(Value) $ 0
0	0	Make and year: N/A
		Model: N/A
		Registration # N/A

Motor vehicle #2	Other assets	Other assets
(Value) $ -0-	(Value) $ -0-	(Value) $ -0-
Make and year: N/A	N/A	None N/A
Model: None	None	
Registration #: N/A	N/A	N/A

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
-None-	$ -0-	$ 0
None	$ 0	$ 0
None	$ 0	$ 0
None	$ 0	$ 0

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	Relationship	Age
None	N/A	0
None	N/A	0
None	N/A	0

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? [ ] Yes [X] No Is property insurance included? [ ] Yes [X] No	$ 0	$ 0

Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 3.00	$ 3.00
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$ 0	$ 0
Life:	$ 0	$ 0
Health:	$ 0	$ 0
Motor vehicle:	$ 0	$ 0
Other:	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (specify):	$ 0	$ 0
Installment payments		
Motor Vehicle: N/A	$ 0	$ 0
Credit card (name): N/A	$ 0	$ 0
Department store (name): N/A	$ 0	$ 0
Other: None	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): Hygiene Items — deodorant, toothpaste, ect	$ 10.00	$ 10.00
Total monthly expenses:	$ 10.00	$ 10.00

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [✓] No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?* [ ] Yes [✓] No

If yes, how much? $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*
ALABAMA DEPT. OF CORRECTIONS does NOT allow DEATH ROW INMATES TO EARN AN INCOME, WHICH PREVENTS ME FROM BEING ABLE TO PAY THE DOCKET FEE.

12. *State the city and state of your legal residence.* ATMORE, ALABAMA

Your daytime phone number: (251) NONE

Your age: 55 *Your years of schooling:* 14

Last four digits of your social-security number: 5298

James E. McWilliams

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON JULY 13, 2016

Dawn Williams
NOTARY PUBLIC

My Commission Expires July 17, 2016

Alabama Department of Corrections

ITF001

Average Inmate Deposit Balances for MCWILLIAMS, JAMES EDMOND JR AIS# 0000Z467

	Average Balance	Gross Deposits
06/30/2016	$11.13	$54.00
05/31/2016	$7.57	$35.00
04/30/2016	$9.86	$60.00
03/31/2016	$5.49	$25.00
02/29/2016	$0.03	$0.00
01/31/2016	$0.03	$0.00
12/31/2015	$1.20	$34.00
11/30/2015	$1.68	$0.00
10/31/2015	$32.92	$185.00
09/30/2015	$5.52	$24.00
08/31/2015	$11.27	$24.00
07/31/2015	$8.62	$40.00
	$7.78	$481.00

I certify that this is a true and correct copy of James McWilliams average balances and gross deposits.

Nikita Tucker

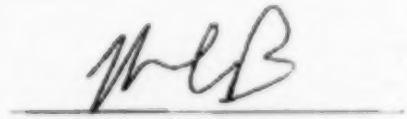
Nikita Tucker

Run Date: 7/13/2016 12:22:08 PM

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on July 15, 2016, I served a copy of the foregoing via first-class mail, postage prepaid, and via email, upon counsel for the Respondent:

Henry M. Johnson
Assistant Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel. 334-353-9095
hjohnson@ago.state.al.us



Mark Loudon-Brown

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906-P

JAMES MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

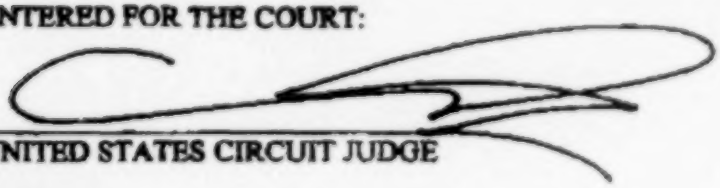
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906

D.C. Docket No. 7:04-cv-02923-RDP

JAMES E. MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2015)

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

James Edmund McWilliams, Jr., an inmate on Alabama's death row, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his death sentence.

We granted McWilliams a Certificate of Appealability (COA) on four issues: (1) whether the district court erred in holding the state court was not objectively unreasonable in determining McWilliams failed to show a violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985); (2) whether McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights by denying him a continuance for his sentencing hearing; (3) whether the district court erred in finding the state court was not objectively unreasonable in ruling McWilliams received effective assistance of counsel during the penalty phase of his trial and sentencing; and (4) whether the district court erred in determining the state court was not objectively unreasonable in holding McWilliams's rights under *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229 (1965) were not violated.

We hold that the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's *Ake* claim, his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and his *Griffin* claim. We also hold that McWilliams is procedurally barred from arguing the trial court

violated his Sixth Amendment rights in denying his motion for continuance. Accordingly, we affirm.

I. BACKGROUND

On December 30, 1984, McWilliams entered a convenience store in Tuscaloosa, Alabama, where Patricia Reynolds was working the nightshift by herself. McWilliams locked the doors behind him and proceeded to rob and brutally rape Ms. Reynolds. When he was finished, he shot her with a .38 caliber handgun. Ms. Reynolds died in surgery that night.

McWilliams was arrested driving a stolen car in Ohio with the murder weapon in his possession soon afterwards. He was identified by eyewitnesses who placed him at the scene. While in jail in Ohio, McWilliams bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

In the months leading up to the murder, McWilliams was voluntarily attending mental health counseling in the form of couple's therapy with his pregnant wife at the office of Dr. Sherril Rhodes.[1] After meeting with McWilliams, Dr. Rhodes documented in a report that "there are deeper psychological problems that [McWilliams] is avoiding and hopefully the testing will reveal this." She also suspected the presence of "psychosis, or possibly manic-depressive disorder." Dr. Rhodes then set up an appointment for

[1] Dr. Rhodes's reports and notes were introduced into evidence during the Rule 32 hearing.

McWilliams to undergo psychological testing with Dr. Marci K. Davis,[2] a clinical psychologist, on October 15, 1984.

Dr. Davis administered the Minnesota Multiphasic Personality Inventory (MMPI) to McWilliams and concluded that McWilliams's MMPI test scores "on the surface indicate that the results are invalid due to faking bad." However, on closer examination, she then determined that "[McWilliams] did tell the truth and took the test in good faith . . . [c]onsequently, we may assume that he is extremely disturbed, has much internal anxiety, and we would expect to find serious pathology." Dr. Davis also recommended McWilliams be admitted to an inpatient treatment facility, evaluated by a psychiatrist for medication, and carefully monitored by counselors. Dr. Davis ended the report by warning other counselors not to meet with McWilliams alone after dark. Nonetheless, McWilliams did not return to counseling before murdering Ms. Reynolds two and a half months later.

A. The Lunacy Commission

McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case, but the central cause for most of the speculation stems from McWilliams's tendency to malinger, or fake symptoms of his alleged mental illness.

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[2] Dr. Davis's reports were entered into evidence during the penalty phase.

McWilliams's counsel began investigating McWilliams's mental health less than a month after he was arrested for murdering Ms. Reynolds. On January 21, 1986, counsel petitioned the Circuit Court of Tuscaloosa County to provide a psychiatric assessment of McWilliams, including an evaluation of his sanity, his competency, and any mitigating circumstances.[3] The court granted the petition and ordered the State of Alabama (State) to create a "Lunacy Commission" to evaluate McWilliams's mental health at the Taylor Hardin Secure Medical Facility (Taylor Hardin). The Lunacy Commission reported directly to the court.

On June 4, 1986, the Lunacy Commission presented the court with a three-and-a-half-page report summarizing the conclusions of three doctors serving on the Commission.[4] All three doctors concluded McWilliams was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms.

B. Trial and Penalty Phase

On August 27, 1986, the jury found McWilliams guilty of murder during robbery in the first degree and murder during rape in the first degree. The penalty phase took place the following day. Counsel's strategy during the penalty phase was to present McWilliams as a man who grew up with significant psychological

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[3] The petition is known as a "Petition for Inquisition Upon Alleged Insane Prisoner."

[4] Four doctors appear in the report, including Dr. Norman G. Poythress, the Director of Clinical Services at Taylor Hardin. Dr. Poythress did not summarize his own medical conclusions but did ultimately sign the report on May 27, 1986.

problems that affected his behavior. Although counsel subpoenaed Dr. Rhodes to testify during the penalty phase, Dr. Rhodes did not respond to the subpoena. Ultimately, only McWilliams and his mother testified for the defense. McWilliams and his mother testified that McWilliams had head injuries as a child and a history of blacking out, hallucinating, chronic headaches, doctor visits, and memory problems. Prior to this testimony, counsel was unaware of these injuries and conditions.

McWilliams was permitted to read Dr. Davis's report and her MMPI test results into the record and explain his mental health issues to the jury. The court also admitted Dr. Davis's report into evidence. However, McWilliams was unable to explain any technical aspects of the report, and when cross-examined, he told the prosecutor that he was not a psychologist. The State then presented two mental health experts from the Lunacy Commission, who each testified that McWilliams was faking psychotic symptoms and was not mentally ill. The jury voted 10 to 2 in favor of the death sentence.

C. Sentencing Hearing

On September 3, 1986, counsel filed a motion requesting that McWilliams undergo neuropsychological testing for possible organic brain damage, based on the information revealed during the penalty phase about his head injuries. The court granted the request, ordering the Alabama Department of Corrections (DOC)

to perform complete neurological and neuropsychological testing on McWilliams. The court further instructed the DOC to send all results and evaluations to the court no later than September 25, 1986.

On September 22, 1986, Dr. Paul Bivens, a psychologist employed by the DOC, wrote the court, explaining that he completed some of the neuropsychological testing, which indicated "possible organic impairment," but was unable to complete all the neuropsychological tests. Instead, Dr. Bivens recommended more testing and advised the court to find a clinical neuropsychological specialist who could perform the tests independent of the DOC to "avoid unnecessary conflict."

On September 30, 1986, the trial court appointed Dr. John R. Goff, a specialist in clinical neuropsychology and the Chief of Psychology at Bryce Hospital. Dr. Goff met with McWilliams on October 3, 1986, and performed the neuropsychological testing requested by counsel. Dr. Goff's completed neuropsychological assessment was delivered to all the parties approximately 48 hours before the sentencing hearing.

Dr. Goff's report was approximately five pages long. He determined that McWilliams was suffering from organic brain dysfunction and that "organic personality disorder should be considered." His report also indicated evidence of malingering but noted it was potentially consistent with a "cry for help posture" or

possibly a "fake bad." The report further explained there were some "genuine neuropsychological problems," and Dr. Goff diagnosed McWilliams with "organic personality syndrome."

Counsel subpoenaed McWilliams's medical and psychiatric records multiple times before the penalty phase and well in advance of the sentencing hearing. But, the DOC and Taylor Hardin failed to fully comply with the subpoena until the day of the sentencing hearing. The last of the medical and psychiatric records subpoenaed by counsel arrived at the court on October 8 and October 9, 1986—the morning of the 10 a.m. sentencing hearing.

At the sentencing hearing, counsel moved for a continuance to review the newly arrived records with the assistance of an expert. The court denied the request but invited counsel to review the records at the clerk's office during a brief recess. When the hearing resumed at 2 p.m., the court admitted Dr. Goff's report and all the new records into evidence. Counsel again asked for a continuance. The court again denied the request.

The court found three aggravating circumstances in support of McWilliams's death sentence: (1) McWilliams was previously convicted of a felony involving the use of violence to the person, specifically a robbery and rape he was convicted of on June 26, 1985; (2) the murder was committed during the course of a robbery and rape; and (3) the murder was especially heinous, atrocious,

or cruel compared to other capital offenses in light of the brutality of the rape, the execution-type slaying, and McWilliams's behavior after the crime. The court found no mitigating circumstances.

The court determined that "the [d]efendant is not psychotic, either from organic brain dysfunction or any other reason." The court did find that "the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that does not rise to the level of a mitigating circumstance" and by "a preponderance of the evidence . . . the defendant [is] feigning, faking, and manipulative." The court then sentenced McWilliams to death by electrocution.

D. Rule 32 Evidentiary Hearing

On April 2, 1997, McWilliams challenged his conviction in a petition under Rule 32 of the Alabama Rules of Criminal Procedure, claiming that his counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase and sentencing. On June 12, 2000, the Alabama circuit court conducted a four-day evidentiary hearing. In September 2001, the Alabama circuit court denied the petition. In 2004, the Alabama Court of Criminal Appeals reviewed and affirmed the decision.

The Rule 32 evidentiary hearing on McWilliams's post-conviction claims included the testimony of defense expert Dr. George Woods and the State's

rebuttal expert, Dr. Karl Kirkland. Dr. Woods reviewed the MMPI performed by Dr. Davis that McWilliams read to the jury during the penalty phase. Dr. Woods explained the test could be confused with exaggerated scores but actually indicated McWilliams had significant psychiatric and psychological problems, including paranoia and mania, as well as "abundant evidence of psychopathology." Dr. Woods agreed with Dr. Davis that McWilliams took the MMPI in good faith. Dr. Woods also examined the 1986 MMPI testing performed at Taylor Hardin, which the State used during the penalty phase. He explained that the results indicated a cry for help with severe psychopathology and did not necessarily mean McWilliams faked his symptoms.

Dr. Woods also reviewed Dr. Goff's report and testified that the results revealed symptoms of a psychiatric disorder, but because neuropsychological impairments change over time, McWilliams's neuropsychological function was somewhat restored as of 2000. Dr. Woods further testified that he reviewed the DOC records, and the records revealed McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Dr. Woods stated that, in examining the DOC records, the administration of medication was consistent with the presentation of symptoms that required psychiatric treatment.

Dr. Woods ultimately diagnosed McWilliams with bipolar disorder, with symptoms of mania, hypomania, and depression. Dr. Woods also concluded that

McWilliams was suffering from bipolar disorder on the night of the crime. Dr. Karl Kirkland, a forensic psychologist, testified that he disagreed with Dr. Woods's diagnosis. Dr. Kirkland agreed with the evaluation of the Taylor Hardin doctors that McWilliams was feigning psychiatric symptoms and that his behavior was more appropriately categorized as a character disorder.

II. PROCEDURAL HISTORY

McWilliams's conviction and death sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *See McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part, remanded in part sub nom., Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand to sub nom., McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion after remand*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd sub nom., Ex part McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied sub nom., McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

The Alabama circuit court entered its final order denying McWilliams's Rule 32 petition in September 2001, and the Alabama Court of Criminal Appeals affirmed the denial. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). On September 24, 2004, the Alabama Supreme Court denied McWilliams's petition for a writ of certiorari on his Rule 32 petition.

McWilliams then turned to the federal courts. On October 6, 2004, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. The district court assigned a magistrate judge to review McWilliams's petition and submit a recommendation. On February 1, 2008, the magistrate judge issued a report and recommendation denying all of McWilliams's claims. On August 25, 2010, the district court entered a memorandum opinion adopting the magistrate judge's conclusions. The district court further addressed specific objections McWilliams raised to the magistrate judge's report and recommendation and then entered an order dismissing McWilliams's habeas petition with prejudice and denying his application for a COA.

This court granted a COA on whether the district court improperly overruled all of McWilliams's objections to the magistrate judge's report and recommendation without specifically acknowledging certain objections. On September 10, 2012, we vacated the district court's decision and remanded McWilliams's case to the district court with instructions to resolve all the claims in his habeas petition. The district court then entered a memorandum opinion on April 17, 2013 overruling all of McWilliams's objections to the magistrate judge's report, adopting the report in full, and denying McWilliams's habeas petition. On October 7, 2013, the district court again denied McWilliams's request for a COA.

McWilliams then filed an application for a COA in this court. On December 16, 2013, we granted McWilliams a COA.

III. STANDARD OF REVIEW

"When examining a district court's denial of a . . . habeas petition, we review questions of law and mixed questions of law and fact *de novo,* and findings of fact for clear error." *Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 620 (11th Cir. 2013) (internal quotation marks omitted).

"Because [McWilliams] filed his federal petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death [Penalty] Act of 1996 (AEDPA)." *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011). When a state court has denied a claim on the merits, "the standard a petitioner must meet to obtain federal habeas relief was intended to be, and is, a difficult one." *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011)).

The "purpose of AEDPA's" amendments to § 2254 "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. __, __, 132 S. Ct. 38, 43–44 (2011) (internal quotation marks omitted). Therefore, federal review of final state court decisions under § 2254 is

"greatly circumscribed" and "highly deferential." *See Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (internal quotation marks omitted). AEDPA only allows federal courts to grant relief for habeas claims decided by a state court on the merits if the state court's resolution of the claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

Under AEDPA, "the state court's application of governing [F]ederal law . . . must be shown to be not only erroneous, but objectively unreasonable." *Waddington v. Sarausad*, 555 U.S. 179, 190, 129 S. Ct. 823, 831 (2009) (internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 410–11, 120 S. Ct. 1495, 1522 (2000) ("[A]n *unreasonable* application of [F]ederal law is different from an *incorrect* application of [F]ederal law."). This is a "substantially higher threshold" than when only a showing of erroneousness is required. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939 (2007). When assessing the state court's decision, we must consider the record the court had before it. *Cullen v. Pinholster*, 563 U.S. 170, __, 131 S. Ct. 1388, 1400 (2011). It is the petitioner's burden to demonstrate that the state court applied the relevant clearly

established law to that record "in an objectively unreasonable manner." *See Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002) (per curiam). Given this determination is objective, a federal court may not issue a writ of habeas corpus simply because "it concludes in its independent judgment" that the state court was incorrect. *See Williams*, 529 U.S. at 409–11, 120 S. Ct. at 1522.

Our review of a petitioner's claim is further limited under § 2254(e)(1) by "a presumption of correctness [that] applies to the factual findings made by state trial and appellate courts." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (internal quotation marks omitted). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Id.* (internal quotation mark omitted). "Instead, it must conclude that the state court's findings lacked even fair support in the record." *Id.* (internal quotation mark omitted). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

IV. DISCUSSION

A. Alabama's Application of *Ake*

McWilliams contends the State deprived him of due process under *Ake* because the State did not provide him the meaningful assistance of an independent psychiatric expert at his sentencing hearing.

Under *Ake*, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. This right "extends to the sentencing phase of a criminal case." *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012) (internal quotation marks omitted). However, *Ake* cautions that a defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Rather, *Ake* entitles the defendant access to a "competent psychiatrist." *Id.* "[T]he decision on how to implement this right" is left "to the [s]tate." *Id.*

McWilliams first argues that he was denied the assistance contemplated by *Ake* because he was not provided an "expert of his own." Specifically, McWilliams asserts that he was denied such an expert because Dr. Goff's assistance was "equally disseminated to all parties." The State contends there is no clearly established Federal law that requires it to provide a partisan mental health expert to the defense and, therefore, McWilliams is not entitled to federal habeas relief on this basis.

In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*. *See Miller v. Colson*, 694 F.3d 691, 697–99 (6th Cir. 2012) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*), *cert. denied*; *Granviel v. Lynaugh*, 881 F.2d 185, 191–92 (5th Cir. 1989) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance), *cert. denied*. Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*. *See United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."). However, the United States Supreme Court has thus far declined to resolve this disagreement among the circuits. *See Miller*, 694 F.3d at 697 n. 6; *Granviel v. Texas*, 493 U.S. 963, 110 S. Ct. 2577 (1990) (denying certiorari). As a result, the State's provision of a neutral psychologist would not be "contrary to, or involve[] an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1). Therefore, McWilliams's argument fails.

McWilliams next contends that Dr. Goff's late arrival to the proceedings denied him due process under *Ake*. The State asserts a defendant is only entitled to

assistance from a psychiatrist under *Ake* and the trial court's appointment of Dr. Goff satisfied this requirement.

McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Even assuming an *Ake* error occurred, relief may only be granted if the error had a "substantial and injurious effect or influence" on the outcome of

McWilliams's case. *See Hicks v. Head*, 333 F.3d 1280, 1286–87 (11th Cir. 2003) (internal quotation marks omitted). The jury at McWilliams's penalty phase voted 10 to 2 in favor of the death penalty. The trial judge reviewed Dr. Goff's report and took into account the possibility of organic brain damage but also noted that, throughout McWilliams's medical records, different psychologists and psychiatrists describe him as a malingerer. For example, the mental health professionals on the Lunacy Commission determined McWilliams was a malingerer and a faker; Dr. Goff's report indicated that McWilliams was malingering on some level; Dr. Kirkland determined McWilliams was faking symptoms; and even Dr. Woods, McWilliams's post-conviction expert admitted McWilliams has a history of malingering and can be deceitful and manipulative. Moreover, Dr. Woods was the only doctor who diagnosed McWilliams as bipolar—a diagnosis contested by Dr. Kirkland. Based on a review of this and other evidence, the trial judge found that McWilliams's "aggravating circumstances overwhelmingly outweighed the mitigating circumstances."

A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime. Accordingly, even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence.

B. Procedural Default

McWilliams argued to the district court that he was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused his motion for continuance of the sentencing hearing. However, the magistrate judge determined McWilliams did not properly raise this claim before the Alabama Supreme Court and, in turn, McWilliams failed to exhaust his state remedies. Therefore, the district court determined this claim is procedurally barred.

When a habeas claim arises in state court, the petitioner must exhaust his state remedies. 28 U.S.C. § 2254(b)(1)(A). In order to satisfy the exhaustion requirement, a petitioner must "fairly presen[t] federal claims to the state courts in order to give the [s]tate the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888 (1995) (per curiam) (internal quotation marks omitted). The petitioner must apprise the state court of "the federal constitutional issue," not just the underlying facts of the claim or a "somewhat similar state-law claim." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (internal quotation marks omitted). The Supreme Court has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10, 112 S. Ct. 1715, 1720 (1992). The Court further explained:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just

> as the [s]tate must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the [s]tate a full and fair opportunity to address and resolve the claim on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n. 25 (11th Cir. 2003).

McWilliams first raised his ineffective assistance of counsel claim based on the motion for continuance in his direct appeal to the Alabama Court of Criminal Appeals. The court denied this claim because McWilliams "demonstrated no prejudice." *McWilliams v. State*, 640 So. 2d 982, 993 (Ala. Crim. App. 1991). McWilliams then petitioned the Alabama Supreme Court for a writ of certiorari. In his petition, McWilliams asserted: (1) his rights were violated "under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and (2) the Alabama Court of Criminal Appeals erred by holding he had not demonstrated prejudice. The Alabama Supreme Court declined to review the petition.

McWilliams only mentioned his motion for continuance in Sections VIII and IX of his brief to the Alabama Supreme Court. But, he failed to argue in either of those Sections that the denial of the motion violated his right to effective assistance of counsel. Although Section VIII asserted the trial court abused its discretion in denying McWilliams's motion for continuance, McWilliams did not allege the denial violated his right to effective assistance of counsel, and he did not mention the phrase "effective assistance of counsel" or cite *Strickland v. Washington*, 466

U.S. 668, 104 S. Ct. 2052 (1984). McWilliams also did not mention *Strickland* or use the phrase "effective assistance of counsel" in Section IX of the brief.

Accordingly, McWilliams did not apprise the state court of his constitutional claim regarding his motion for continuance of the sentencing hearing. The district court did not err in concluding McWilliams's ineffective assistance of counsel claim is procedurally barred.

C. Ineffective Assistance of Counsel During the Penalty Phase of Trial and Sentencing

McWilliams also claims counsel was ineffective for failing to investigate or present mitigating evidence during the penalty phase of his trial and sentencing.

The district court's denial of McWilliams's habeas corpus petition on this issue is reviewed de novo. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

As with McWilliams's *Ake* claim, we may only grant habeas relief on this issue if the State's resolution of the Rule 32 proceedings and subsequent appeals resulted in a decision that was either (1) "contrary to or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d). Therefore, in contrast to our review of a *Strickland* claim on direct appeal from a federal district court, we must defer to the state court unless its application of *Strickland* was unreasonable. *See Richter*, 562

U.S. at 101, 131 S. Ct. at 785. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 786 (internal quotation marks omitted). Furthermore, as discussed above, we must presume the state court's factual findings to be correct unless the petitioner rebuts this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"The object of an ineffectiveness claim is not to grade counsel's performance." *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069; *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). The issue is "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126 (1987) (internal quotation marks omitted).

To establish that his counsel provided constitutionally ineffective assistance, McWilliams must show both that "counsel's performance was deficient" and that the deficiency "prejudiced [his] defense." *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance is representation that falls "below an objective standard of reasonableness" measured by "prevailing professional norms." *See id.* at 687–88, 104 S. Ct. at 2064–65. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. Thus, "to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take*." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001).

Given the strong presumption of reasonableness under *Strickland* and the requirements of AEDPA, our review of counsel's performance is "doubly deferential." *See Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420 (2009). McWilliams's claim cannot succeed unless he provides affirmative evidence of ineffectiveness—an "absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. __, 134 S. Ct. 10, 17 (2013) (internal quotation marks omitted).

McWilliams asserts counsel was ineffective because counsel failed to investigate and present evidence of McWilliams's family history and mental health. According to McWilliams, the mitigation evidence presented at his post-conviction hearings shows the evidence counsel offered during trial and sentencing was deficient. But, the Alabama Court of Criminal Appeals determined that counsel diligently investigated and presented evidence about McWilliams's family history and mental health, and this conclusion does not unreasonably contravene clearly established Federal law.

First, counsel spoke to McWilliams's mother, father, and wife about McWilliams's family history. Counsel also telephoned McWilliams's friends. Counsel testified at the Rule 32 evidentiary hearing that he would have investigated any other potentially useful sources of information or individuals mentioned to him as possible mitigation witnesses. Moreover, McWilliams's mother and McWilliams testified extensively about his childhood during the penalty phase.

Second, counsel: (1) requested that McWilliams be evaluated by the Lunacy Commission; (2) retrieved McWilliams's medical records, despite the DOC and Taylor Hardin ignoring his subpoenas; (3) obtained the assistance of a volunteer psychologist, (4) arranged for McWilliams to be evaluated by Dr. Goff, and (5) subpoenaed McWilliams's previous psychologist to testify during the penalty phase. Although the subpoenaed psychologist did not respond to the subpoena, counsel testified at the Rule 32 hearing that he made a strategic decision not to enforce the subpoena because forcing a doctor into court could backfire. Furthermore, although counsel did not learn of the head injuries McWilliams sustained as a child until the penalty phase of trial, the Lunacy Commission reported no evidence of a brain injury. Therefore, it was reasonable for counsel to conclude that McWilliams had no such injuries. Nevertheless, once counsel learned of the head injuries, he immediately moved for and obtained a

neuropsychological report prior to the sentencing hearing. At the hearing, the report was admitted into evidence.

In undertaking such efforts, counsel's investigation of McWilliams's family history and mental health was reasonable. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1241–43 (11th Cir. 2010) (finding that counsel performed an adequate mitigation investigation where he gathered medical records and assisted with the development of an expert evaluation report). In addition, given McWilliams's questionable mental health history and the limited value of his family background information, it cannot be found that "no competent counsel" would have adopted the same approach as counsel. *See Grayson*, 257 F.3d at 1216. While counsel may have been able to present more mitigation evidence, this alone does not render his decision not to do so unreasonable. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

On this record, McWilliams has not met his AEDPA burden. He has not shown that counsel's performance was so deficient as to overcome the "doubly deferential" standard required for relief. *See Knowles*, 556 U.S. at 123, 129 S. Ct.

at 1420. We therefore reject McWilliams's claim of ineffective assistance of counsel.

D. Prosecutorial Misconduct

Finally, McWilliams alleges the prosecutor's comments during closing argument on his failure to testify at trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. McWilliams contends these statements denied him a fair trial because they constituted improper burden-shifting arguments.

McWilliams's claim of prosecutorial misconduct involves mixed questions of law and fact and, therefore, is reviewed de novo. *See United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997).

The Fifth and Fourteenth Amendments "forbid[] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin*, 380 U.S. at 615, 85 S. Ct. at 1233. However, "a prosecutor's indirect reference to a defendant's failure to testify is not reversible error per se." *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995). This court has "strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence." *Isaacs v. Head*, 300 F.3d 1232, 1270 (11th Cir. 2002). "A

comment on the failure of the *defense*, as opposed to that of the *defendant*, to counter or explain the testimony presented or evidence introduced is not [improper burden-shifting]." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215–16 (11th Cir. 1983) (per curiam).

Prosecutorial misconduct during closing argument, including an inappropriate burden-shifting argument, only warrants a new trial if the remarks were "improper" and "prejudicially affect[ed]" the defendant's "substantial rights." *See United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal quotation marks omitted), *aff'd*, 37 F. App'x 978 (11th Cir. 2002). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *Id.* (alterations in original) (internal quotation marks omitted).

McWilliams challenges the following comment made by the prosecution:

> You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it.

Ex parte McWilliams, 640 So. 2d 1015, 1018–19 (Ala. 1993).

The Alabama Court of Criminal Appeals found that the prosecutor's comment was not "intended to be a reference to [McWilliams's] silence." *McWilliams*, 640 So. 2d at 1010. Furthermore, the Alabama Supreme Court determined that "[t]his is clearly a comment on the failure of *defense counsel* to explain testimony or evidence." *Ex parte McWilliams*, 640 So. 2d at 1019–20. The prosecutor began his comment by telling the jury he was referring to what the *defense attorneys* did not talk about "in the *evidence*." While the statement, "[t]here is no good reason, explanation that indicates anything other than guilt in this case," by itself could be taken to mean the defendant did not provide an explanation himself, the prosecutor followed the comment by stating that "the evidence doesn't show any other explanation for it." In light of the entire statement, it is clear that the prosecutor intended the statement to be directed at counsel, and the comment naturally and necessarily related to counsel's arguments regarding the evidence introduced at trial, not McWilliams's constitutionally protected silence.

Accordingly, McWilliams has failed to show the state court's "was contrary to or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *See* 28 U.S.C. § 2254(d).

V. CONCLUSION

For the foregoing reasons, we find as follows. First, the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's (1) *Ake* claim, (2) his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and (3) his claim that the prosecutor improperly commented on his failure to testify. Second, McWilliams's ineffective assistance of counsel claim based on the trial court's denial of his motion for continuance of the sentencing hearing is procedurally defaulted. Therefore, we affirm the district court's denial of McWilliams's petition for a writ of habeas corpus.

AFFIRMED.

JORDAN, Circuit Judge, concurring.

I concur in the judgment denying federal habeas corpus relief to Mr. McWilliams. My reasons are as follows.

• The ineffective assistance of counsel claim based on the denial of the continuance of the sentencing hearing was not exhausted under 28 U.S.C. § 2254(b)(1) because Mr. McWilliams did not present it in his petition for discretionary review to the Alabama Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

• The ineffective assistance of counsel claim related to the investigation and presentation of mitigating evidence at the penalty phase fails because counsel conducted a competent mental health investigation; had Mr. McWilliams evaluated not once, but twice; and presented mitigating evidence (including Dr. Goff's report) at the sentencing hearing. *See Bobby v. Van Hook*, 558 U.S. 4, 9-12 (2009).

• The claim based on a violation of *Griffin v. California*, 380 U.S. 609 (1965), is a close one, as shown by the fact that two judges on the Alabama Court of Criminal Appeals sided with Mr. McWilliams. See *McWilliams v. State*, 640 So.2d 982, 1014 (Ala. Cr. App. 1991) (Bowen, J., dissenting in part). But given AEDPA deference, the finding by the Court of Criminal Appeals that the prosecutor's argument was not a comment on Mr. McWilliams' right to remain silent was a reasonable application of *Griffin*.

• The claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is also close, for the reasons outlined in Judge Wilson's dissent. At the end of the day, however, I think the claim fails. First, the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert. As a result, I cannot say that the Court of Criminal Appeals unreasonably applied, or ruled in a way that was contrary to, *Ake*. *See Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015). Second, I do not think Mr. McWilliams has shown a "substantial and injurious effect" from any *Ake* violation. *See Fry v. Pliler*, 551 U.S. 112, 119-20 (2007). I reach this conclusion in part because Mr. McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing. Given this void in the record, it is difficult for me to conclude that Mr. McWilliams has met his burden on prejudice, as we do not know how additional time with Dr. Goff (and his report) would have benefited the defense. My point is not that a capital defendant must always present the testimony of his medical expert at a post-conviction hearing to prove prejudice under *Ake*. It is, instead, that in this case Dr. Goff's absence is one of the reasons that Mr. McWilliams cannot show a "substantial and injurious effect."

WILSON, Circuit Judge, dissenting:

Defendants facing the death penalty—the "gravest sentence our society may impose"—must have "a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. __, __, 134 S. Ct. 1986, 2001 (2014). This means that they must receive "meaningful access to justice" during their capital proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76–77, 105 S. Ct. 1087, 1092–1093 (1985). In *Ake*, the Supreme Court held that this guarantee requires states to provide defendants meaningful "access to a psychiatrist[]" when their mental health "is likely to be a significant factor" at trial or sentencing. *See id.* at 74–77, 105 S. Ct. at 1091–1093. James Edmund McWilliams, Jr. was denied this basic right.

McWilliams's mitigation case depended on the judge and jury's conclusions about his mental health. Nonetheless, McWilliams did not receive any expert assistance during his sentencing before the jury. And, at his judicial sentencing hearing, he again was denied assistance, absent an expert report provided hours beforehand from a mental health expert who did not have the opportunity to review his full psychiatric history. This was not meaningful assistance. For these reasons, Alabama's resolution of McWilliams's *Ake* claim was "an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would reverse the district court's denial of McWilliams's habeas

petition with directions to remand the case to state court for a new sentencing hearing.

I.

The penalty phase of McWilliams's trial began on August 28, 1986. On that date, a sentencing hearing was held before the jury. Although McWilliams received psychological services in the months leading up to the murder of Patricia Reynolds and his mental health history formed the basis of his mitigation case, the trial court did not provide him access to a psychiatrist during this phase. Moreover, defense counsel subpoenaed Dr. Sherril Rhodes to testify at the hearing, but Dr. Rhodes did not appear. Ultimately, McWilliams and his mother were the only witnesses for the defense during the penalty phase. Meanwhile, the State proffered multiple expert psychiatric witnesses.

McWilliams's judicial sentencing hearing was scheduled for October 9, 1986. On September 30, 1986, the trial court appointed a clinical neuropsychologist, Dr. John R. Goff—a state employee—to examine McWilliams and generate a report. Dr. Goff provided his report to both the prosecution and defense on October 7, 1986. The report stated that McWilliams's "neuropsychological assessment [wa]s reflective of organic brain dysfunction which is localized to the right cerebral hemisphere." It also found there was evidence of "cortical dysfunction attributable to the right cerebral hemisphere

dysfunction." The report concluded that "in light of [McWilliams's] obvious neuropsychological deficit, organic personality syndrome should be considered." The next day, on October 8, the court advised defense counsel that it had just received McWilliams's medical and psychiatric Department of Corrections (DOC) records, which counsel had subpoenaed multiple times. However, various records remained missing. The DOC produced more records on October 9—the day of the sentencing hearing.

Faced with less than 48 hours to review this new information and consider its usefulness, defense counsel sought more time to secure the services of an expert to assist him in evaluating the records. Counsel stated to the court:

> [G]iven the nature of this case . . . it is necessary on my part to have someone else review these findings. . . . [W]e are unable to present anything because of the shortness of time between which this material was supplied to us and the date of the hearing. . . . It is the position of the Defense that we received these records at such a late date, such a late time that it has put us in a position as layman, with regard to psychological matters, that we cannot adequately make a determination as to what to present to The [sic] Court with regards to the particular deficiencies that the Defendant has. . . . [W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

Nevertheless, the court denied the Motion for Continuance.

This sequence of events does not constitute the meaningful access to a mental health expert contemplated by *Ake*.

II.

A. An Unreasonable Application of Ake

Ake is unequivocal: due process requires states to provide a defendant the access to a psychiatrist necessary to assure him "a fair opportunity to present his defense" and the ability "to participate meaningfully in [his] judicial proceeding[s]." *See Ake*, 470 U.S. at 76–77, 83–84, 105 S. Ct. at 1092–93, 1096–97; *Medina v. California*, 505 U.S. 437, 444–45, 112 S. Ct. 2572, 2577 (1992) ("The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him a fair opportunity to present his defense and to participate meaningfully in the judicial proceeding." (internal quotation marks omitted)). Accordingly, "[t]he [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination ***and assist in evaluation, preparation, and presentation of the defense.***" *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096 (emphasis added). This requirement applies to any trial or sentencing proceedings in which the defendant's mental health will be a

significant factor.[1] *See id.* at 83–84, 105 S. Ct. at 1096–97; *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012).

Providing further insight into the type of assistance compelled by *Ake*, the *Ake* Court explained the role of the psychiatrist in this context as: (1) gathering facts—through an examination, interviews, and elsewhere—to share with the judge and jury; (2) analyzing the information gathered and rendering conclusions about the defendant's mental condition; (3) assisting the defendant with identifying the probative questions to ask of the prosecution's psychiatrists; (4) assisting the defendant with understanding the opinions proffered by the other party's psychiatrists; and (5) helping lay jurors make a sensible and educated determination about the defendant's mental condition. *See Ake*, 470 U.S. at 80–81, 105 S. Ct. at 1095.

Thus, *Ake* does not simply entitle a criminal defendant to expert assistance; the assistance must be meaningful. McWilliams was denied this right during both the penalty phase and judicial sentencing hearing.

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[1] Here, it was clear that McWilliams's mental health was a significant factor in his sentencing proceedings, including both the penalty phase and judicial sentencing hearing. There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing. Moreover, at the penalty phase, the trial court was aware of the substantial role that McWilliams's mental health was to play in his case for mitigation—the defense informed the court that it subpoenaed a mental health expert to testify at the penalty phase hearing, and at the hearing, the State offered expert psychiatric testimony, and McWilliams's mother testified about McWilliams's childhood head trauma.

1. As with the Defendant in *Ake*, McWilliams Was Not Provided Any Psychiatric Assistance When He Appeared Before the Jury for Sentencing.

The facts surrounding McWilliams's penalty phase hearing mirror those that resulted in a denial of due process in *Ake*. After the defendant in *Ake* was found guilty, he appeared before the jury for sentencing. During this proceeding, the prosecution relied on testimony from state psychiatrists who examined the defendant, but the defendant had "no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment." *Id.* at 73, 105 S. Ct. at 1091. The Court held that the defendant was denied due process as a result of the state's failure to provide him access to a psychiatrist at the proceeding. *Id.* at 86–87, 105 S. Ct. at 1098. Likewise, McWilliams appeared before the jury for sentencing—his "penalty phase" hearing—after his verdict was rendered, and the trial court did not provide him any access to a psychiatrist, leaving him with no means to rebut the State's expert testimony. Therefore, as in *Ake*, McWilliams was denied due process when he appeared before the jury for sentencing.

2. The Trial Court Failed to Provide McWilliams Meaningful Assistance at the Judicial Sentencing Hearing.

The trial court's failure during the penalty phase could have been remedied through the provision of meaningful expert assistance for the judicial sentencing hearing. But, the trial court did not provide McWilliams such assistance, thereby denying him due process.

First, Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*. This court has previously explained that a psychiatric examination must be done "at such a time to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). Dr. Goff was unable to provide assistance to the defense until less than 48 hours before the judicial sentencing hearing—when his report and findings were finally completed. This was an inadequate amount of time for Dr. Goff to educate defense counsel on the report, assist counsel in developing a strategy and testimony for the hearing, and/or help counsel understand and respond to the testimony put forth by the State's expert witnesses at the penalty phase. *See Ake*, 470 U.S. at 80–81, 105 S. Ct. at 1095. In light of the technical nature of the report and McWilliams's complex mental health history, the defense did not even have enough time to achieve the basic level of understanding of the report needed to use it at the hearing. Moreover, in the hours leading up to the hearing, defense counsel had to determine how the newly provided DOC records related to the report's findings. Thus, any assistance received from Dr. Goff's report was superficial and far from meaningful.

Second, Dr. Goff could not provide competent assistance because he did not have the benefit of reviewing critical mental health records. Despite defense

counsel's multiple requests to the DOC, the DOC did not produce McWilliams's mental health records until hours before the sentencing hearing—after Dr. Goff's report was completed. These records showed, *inter alia*, that McWilliams was medicated with antipsychotics and antidepressants while incarcerated. Without access to these highly relevant records, Dr. Goff could not have provided a meaningful analysis.[2] *See Blake*, 758 F.2d at 532–33 (finding the defendant was denied due process because the state did not produce records relevant to his expert psychiatrist's testimony until the day before trial); *Starr v. Lockhart*, 23 F.3d 1280, 1288–89 (8th Cir. 1994) (holding that the defendant was denied due process under *Ake* where the psychiatrist was merely "[un]able to interpret or explain" relevant information, including the results of past mental health examinations).

Third, in order to obtain meaningful assistance from a psychiatrist, the defense must be able to speak freely with the psychiatrist about its case, without the prosecution's access to the discussion. As McWilliams points out in his brief, *Ake* is not satisfied by an expert "who would provide . . . assistance to the defendant, only to cross the aisle and disclose to the State the future cross-

[2] Additionally, under these circumstances—where the factfinder is deprived of expert testimony on parts of the defendant's psychiatric history—the factfinder "loses the substantial benefit of potentially probative information," resulting in "a much greater likelihood of an erroneous decision." *See Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 2604 (1986) (plurality opinion) (discussing the application of *Ake*).

examination of defense counsel." However, as a neutral expert, Dr. Goff was free to make such a disclosure.

Relatedly, *Ake* requires that a defendant receive an opportunity—through an independent psychiatrist—to "develop[] his *own* psychiatric evidence to rebut the [State's] evidence and to enhance his defense in mitigation." *Tuggle v. Netherland*, 516 U.S. 10, 13, 116 S. Ct. 283, 285 (1995) (per curiam) (emphasis added). In addition to being a state employee with the ability to speak to the prosecution about his report and the defense's case, Dr. Goff provided his report to the defense and prosecution at the same time. Clearly, the report did not serve as McWilliams's "own psychiatric evidence."[3]

In sum, far from simply being denied the chance to choose his own psychiatrist or receive funds to hire his own psychiatrist, McWilliams was deprived of basic access to a psychiatrist. Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received

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[3] Indeed, we previously stated that "[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (internal quotation marks omitted). Furthermore, the Majority opinion puts us at odds with our sister circuits on this issue. *See Starr*, 23 F.3d at 1287–88, 1290–91, 1294 (examining the relationship between *Ake* and *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391 (1953) and reversing where the defendant was provided a "neutral" state examiner); *Smith v. McCormick*, 914 F.2d 1153, 1157–58 (9th Cir. 1990) (holding that *Ake* requires the provision of a non-neutral psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process. *See Simmons v. South Carolina*, 512 U.S. 154, 164–65, 114 S. Ct. 2187, 2194 (1994) (plurality opinion) (citing *Ake*, 470 U.S. at 83–87, 105 S. Ct. 1096–98) (holding that defendant was denied due process where he was "prevented from rebutting information that the sentencing authority considered"). Given these circumstances, the state court's application of *Ake* was unreasonable.[4]

B. A Substantial and Injurious Effect

We are required to grant habeas relief for an "*Ake* error" if the error had a "substantial and injurious effect" on the trial or sentencing. *See Hicks v. Head*, 333

[4] The concurring opinion states that the Supreme Court has not addressed whether *Ake* is satisfied by the appointment of a neutral psychiatrist and, therefore, the state court did not unreasonably apply *Ake*. This focus on the "neutral expert" issue misses the point. Assuming for the sake of argument that a state's failure to provide a defendant access to his own psychiatrist is not contrary to *Ake*, the state court's decision is still an unreasonable application of *Ake*. As noted above, *Ake* plainly holds that when a defendant's mental health is a significant factor at trial or sentencing, due process requires that the defendant receive access to a psychiatrist who can competently "assist in [the] evaluation, preparation, and presentation of [his] defense." *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Regardless of the "neutral expert" issue, Dr. Goff was unable to assist defense counsel with the preparation and presentation of the defense because he did not finish his report until hours before the sentencing hearing and did not have access to pivotal mental health records. Solely considering these deficiencies, it is clear that McWilliams was denied "the assistance of a psychiatrist for the *development* of his defense." *See Simmons*, 512 U.S. at 165, 114 S. Ct. at 2194 (emphasis added) (summarizing the holding in *Ake*). Said another way, the concurring opinion's focus on the "neutral expert" issue misses the broader controlling issue: whether McWilliams received access to meaningful expert assistance.

F.3d 1280, 1286 (11th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993)) (internal quotation marks omitted). Alabama's *Ake* error had this effect on McWilliams's death sentence, as it precluded McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the State.

At the penalty phase of his trial, McWilliams had no opportunity to respond to testimony provided by the State's expert psychiatrists opining that McWilliams was a malingerer who "faked" mental illness. He was reduced to reading to the judge and jury a technical psychiatric report that indicated he was potentially psychopathic, but the information was virtually useless in the absence of an expert who could explain the report and answer the State's questions. At the judicial sentencing hearing, McWilliams was again denied the assistance he required to respond to the State's expert testimony. Hence, as a result of the trial court's error, a convicted murderer had to testify about his own mental health, was called a liar by State experts, and then was prevented from showing otherwise.

Testimony from McWilliams's state post-conviction hearing shows that, with appropriate assistance, he would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a "cry-for-help." He then explained the

difference between a "fake-bad" and a "cry-for-help" diagnosis; the former is "someone attempting to make themselves look worse," and the latter, while seemingly "very similar" to the former, actually reflects "significant psychiatric and psychological problems." Dr. Woods further contradicted the State's experts by concluding McWilliams was suffering from bipolar disorder the night of the crime. Dr. Woods's findings relied on, *inter alia*, records from the DOC showing McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Due to the trial court's failures, McWilliams was wholly unable to present this or similar evidence during sentencing.

Despite this powerful evidence, the concurring opinion finds that McWilliams has not shown a substantial and injurious effect "in part because . . . [he] did not present Dr. Goff as a witness at the state post-conviction hearing[,]" and therefore, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." *See* Concurring Op. at 32. But, this argument is belied by Dr. Woods's testimony, which shows that McWilliams would have presented "different," significantly "more viable" mental health evidence during sentencing if he was afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense. *See Hicks*, 333 F.3d at 1287.

Furthermore, when considering whether a defendant was prejudiced by a constitutional error that affected his presentation of mitigation evidence, we are required to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweigh[] it against the evidence in aggravation." *See Williams v. Taylor*, 529 U.S. 362, 397–98, 120 S. Ct. 1495, 1515 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751–52, 110 S. Ct. 1441, 1449–50 (1990)); *Hicks*, 333 F.3d at 1286–87 (weighing the mitigation evidence presented during trial and habeas proceedings in considering whether an *Ake* error had a substantial and injurious effect). In other words, we must consider the evidence *before us*. Nonetheless, my concurring colleague is dissuaded, in part, because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." Concurring Op. at 32. In light of the relevant precedent, I am inclined, however, to weigh the evidence in the record, rather than opine about the value of hypothetical evidence not in the record. *See Williams*, 529 U.S. at 397–98, 120 S. Ct. at 1515.

After weighing the available evidence, we are required to ask ourselves: "does a grave doubt exist as to whether" the *Ake* error "substantially influence[d]" McWilliams's sentence? *See Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam). To me, the answer to this question is clear. McWilliams has shown that but-for the trial court's *Ake* error, the court would have been faced with

a starkly different record. McWilliams has put forth evidence contesting the Lunacy Commission, showing he was not malingering, and demonstrating that he suffered from a major mental illness at the time of the crime. Therefore, I cannot find that the *Ake* error did not substantially influence McWilliams's sentence.

III.

Because the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect, I dissent. To remedy the error, I would reverse the district court's denial of the petition for a writ of habeas corpus so that the matter can be remanded to the state court for a new sentencing hearing.

640 So.2d 1015
Supreme Court of Alabama.

Ex parte James Edmund McWILLIAMS, Jr.
(Re James Edmund McWilliams, Jr.
v.
State).

1911242.
|
Jan. 29, 1993.

Defendant was convicted in the Circuit Court, Tuscaloosa County, No. CC–85–437, Jerry Baird, J., of three counts of capital murder and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 640 So.2d 982, affirmed. On grant of petition of writ of certiorari, the Supreme Court, Ingram, J., held that: (1) defendant's Eighth Amendment rights were violated if trial judge, in sentencing him to death, considered portions of victim impact statements; (2) defendant did not make prima facie showing that state used its peremptory strikes in violation of *Batson*; (3) prosecutor's comments in closing argument were not direct comment on defendant's failure to testify; and (4) conviction of defendant of three counts of capital murder arising from same crime did not violate double jeopardy.

Affirmed in part and remanded in part.

On remand to, Ala.Cr.App., 640 So.2d 1025.

Attorneys and Law Firms

***1016** Oliver W. Loewy, Montgomery, for petitioner.

James H. Evans, Atty. Gen., Jean A. Therkelsen, Asst. Atty. Gen., and Sandra J. Stewart, Deputy Atty. Gen., for respondent.

Opinion

INGRAM, Justice.

James Edmund McWilliams, Jr., was convicted by a Tuscaloosa County jury of three counts of capital murder and was sentenced to death. The Court of Criminal Appeals affirmed the conviction and sentence. *See McWilliams v. State*, 640 So.2d 982 (Ala.Crim.App.1991). This Court granted McWilliams's petition for the writ of certiorari. Rule 39(c), A.R.App.P.

In his petition to this Court, McWilliams presents 26 issues for review. He presented all but six of these issues to the Court of Criminal Appeals. That court issued a detailed and lengthy opinion, which provided a thorough treatment of each of the issues raised by McWilliams. We have thoroughly reviewed the record before us for error regarding the issues raised, as well as for plain error not raised.[1] Except as set out in Part I below, we find no error by the Court of Criminal Appeals in affirming the conviction and sentence.

I.

[1] McWilliams asserts that, in sentencing him to death, the trial court considered portions of victim impact statements wherein the victim's family expressed their characterizations and opinions about the crime, the defendant, and the appropriate sentence, and ***1017** that the court erred in doing so. After the jury recommended that McWilliams be sentenced to death, the trial court conducted a separate sentencing hearing in accordance with §§ 13A–5–47 through –52, Ala.Code 1975, and sentenced McWilliams to death. Before the sentencing hearing, the trial court ordered the preparation of a presentence report. That report contained victim impact statements prepared by the victim's family. The statements contained two types of information: 1) statements about the victim and the impact of her death upon the family members, and 2) characterizations and opinions of the defendant, the crime, and the appropriate punishment.

In *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court vacated a death sentence, holding that it violated the defendant's Eighth Amendment rights for the sentencer to consider victim impact statements in sentencing the defendant to death. The victim impact statements in that case contained the same types of information as were in the statements in the present case. In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court partially overruled *Booth*. The Court in *Payne* held that the defendant's Eighth Amendment rights were not violated by the trial court's consideration of statements regarding the victims and the impact of their deaths upon the family members.

The victim impact statements in *Payne* did not contain characterizations or opinions about the defendant, the crime, or the appropriate punishment. That portion of *Booth* that proscribed the trial court's consideration of that type of statement was, therefore, left intact by *Payne*.

We conclude that McWilliams's Eighth Amendment rights were violated if the trial judge in this case considered the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment. Because the record does not reveal whether the trial judge considered these statements in imposing the death sentence on McWilliams, this case must be remanded to the trial court for further proceedings.

On remand, the trial judge is directed to determine and make a written finding stating whether, in imposing the sentence upon James McWilliams, he considered the portions of the presentence report wherein Patricia Reynolds's family members stated their characterizations of McWilliams, the murder of Reynolds, or the appropriate sentence for McWilliams. If, and only if, the trial judge finds that he did consider those portions of the presentence report, then he is hereby directed to vacate McWilliams's death sentence and to hold another sentencing hearing consistent with this opinion.

II.

[2] McWilliams asserts that the prosecution used its peremptory challenges to strike black veniremembers in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The venire from which McWilliams's jury was selected consisted of 68 members, of whom 17 were black. With 9 of its 16 peremptory strikes, the prosecution removed blacks from the venire. Ultimately, four blacks were selected to serve on the jury, and one black served as an alternate. The record shows that McWilliams did not object to the State's use of its peremptory strikes. Accordingly, no hearing was held pursuant to the procedure set out in *Ex parte Branch*, 526 So.2d 609 (Ala.1987).

McWilliams argues that this case should be remanded for the trial court to afford the prosecution an opportunity to present race-neutral reasons for its strikes. We find, however, that McWilliams has not made a prima facie showing that the State used its peremptory strikes in violation of *Batson*.

McWilliams cites several of the factors set out in *Ex parte Branch* that are relevant in determining whether a prima facie showing of discrimination has been made. Significantly, he argues that the State's use of its peremptory challenges evinces a pattern of strikes against black jurors on the venire. *Ex parte Branch*, 526 So.2d at 623. In support of this contention, McWilliams cites *Bui v. State*, 627 So.2d 849 (Ala.Crim.App.1992), *1018 *rev'd, Ex parte Bui*, 627 So.2d 855 (Ala.1992). After Bui's conviction and sentence had been affirmed by the Court of Criminal Appeals and by this Court, the United States Supreme Court remanded the case for our further consideration in light of *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Bui challenged the State's use of 6 of its 13 peremptory strikes to remove blacks from the venire. [2] The venire in that case consisted of either 13 or 15 qualified blacks. [3] *Bui v. State*, 627 So.2d 849 (Ala.Crim.App.1992).

The Court of Criminal Appeals remanded the case to the trial court for a hearing with regard to the State's use of its peremptory challenges. *Bui v. State*, 627 So.2d 849. On remand, the trial court held that the State had not violated *Batson* in the use of its peremptory strikes. On return to remand, the Court of Criminal Appeals held that the record did establish a discriminatory use of peremptory challenges by the State. *Bui v. State*, 627 So.2d 849. Holding that the trial court's conclusion was not clearly erroneous, we reversed the judgment of the Court of Criminal Appeals and remanded the case for the reinstatement of Bui's conviction and sentence. *Ex parte Bui*, 627 So.2d 855.

McWilliams emphasizes that in the present case the State used its peremptory strikes to remove 53% of the qualified blacks from the venire, while in *Bui* the Court of Criminal Appeals remanded the case for a hearing although the State had struck only 46% percent of the qualified blacks from the venire. In *Bui*, 34% of the venire were blacks, and the jury consisted of only one black, or 8% of the empaneled jury. In the present case, however, 25% of the venire consisted of blacks, and 33% of the empaneled jury were blacks. In *Harrell v. State*, 571 So.2d 1270, 1271–72 (Ala.1990), we stated:

> "[A] defendant cannot prove a prima facie case of purposeful discrimination *solely* from the fact that the prosecutor struck one or more blacks from his jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing discriminatory impact [citation omitted], then it should also be available to show the absence of a discriminatory purpose."

Other than by conclusory statements in his brief, McWilliams has made no attempt to show that the State exercised its peremptory strikes in violation of *Batson*, and our review of the record discloses no such violation. Accordingly, we find no error in the State's use of its peremptory challenges.

III.

[3] McWilliams next argues that in its closing argument the State made adverse comments upon McWilliams's choice not to testify. Specifically, McWilliams complains of the following portion of the district attorney's closing argument:

> "You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the *1019 evidence doesn't show any other explanation for it."

It is the law in Alabama that in all criminal prosecutions, the accused shall not be compelled to give evidence against himself. Ala. Const.1901, Art. I, § 6. That privilege is also protected under § 12–21–220, which provides:

> "On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment."

The Fifth and Fourteenth Amendments of the United States Constitution are also violated when the prosecutor comments on the accused's silence. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). "Alabama law clearly holds that '[w]here there is the possibility that a prosecutor's comment could be understood by the jury as reference to failure of the defendant to testify, Art. I, § 6 [Const. of Ala. of 1901] is violated.' " *Ex parte Wilson*, 571 So.2d 1251, 1262 (Ala.1990) (quoting *Ex parte Tucker*, 454 So.2d 552, 553 (Ala.1984)).

McWilliams asserts, and Judge Bowen agreed in his dissent, 640 So.2d at 1014, that the comment made by the prosecutor in this case is virtually indistinguishable from that made in *Windsor v. State*, 593 So.2d 87 (Ala.Crim.App.1991), wherein the Court of Criminal

Appeals reversed a capital murder conviction because of the argument of the prosecutor. The court in *Windsor* focused on the following portion of the prosecutor's argument:

> " 'And the strongest piece of circumstantial evidence that you have in this case, and [defense counsel] just glossed over this—State's Exhibit No. 31 [the victim's gun], it has been identified a number of ways in this case, but they can't explain this—they can't explain why this weapon was in the defendant's pocket when he was arrested. Can you offer me another reasonable hypothesis as to how that weapon got there?' "

593 So.2d at 90.

We note that while in *Windsor* the defendant made a proper objection to the prosecutor's argument and promptly moved for a mistrial, 593 So.2d at 90, the record in this case reveals that McWilliams did not object to the comment he now questions. In its opinion in this case, the Court of Criminal Appeals cited *Kuenzel v. State*, 577 So.2d 474, 489 (Ala.Crim.App.1990), *aff'd, Ex parte Kuenzel*, 577 So.2d 531 (Ala.1991), *cert. denied, Kuenzel v. Alabama*, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), where that court stated:

> " 'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.' Ex parte Kennedy*, 472 So.2d [1106,] at 1111 [(Ala.1985)] (emphasis in [*Kennedy*]). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright*, 778 F.2d 623, 629 n. 6 (11th Cir.1985), *cert. denied*, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), *cert. denied*, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986). See also *Biddie v. State*, 516 So.2d 837, 843 (Ala.Cr.App.1986), *reversed on other grounds*, 516 So.2d 846 (Ala.1987)."

The United States Court of Appeals for the Eleventh Circuit has held that a prosecutor's comments "on the *failure of the defense, as opposed to that of the defendant* to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215–16 (11th Cir.1983) (emphasis added). ***1020** In the present case, the prosecutor commented that "neither of the defense attorneys have talked about" various pieces of physical evidence found in McWilliams's possession. This is clearly a comment on the failure of *defense counsel* to explain testimony or evidence.

McWilliams was arrested at a highway rest area in Ohio. The arresting officer testified that he recovered a handgun and some bullets from the car that McWilliams was driving. The officer further testified that when he asked about the bullets, McWilliams said that he had been chewing on them while driving. McWilliams first denied any knowledge of the handgun, but the officer testified that McWilliams later claimed that his uncle had been in the vehicle earlier and had had the handgun on his person at that time. The prosecutor's comment, therefore, was pointing out the failure of *defense counsel* to offer an explanation for the inconsistencies within the statements made by the defendant. *Duncan, supra.*

[4] A prosecutor "may state or comment on proper inferences from the evidence and may draw conclusions from the evidence based upon his own reasoning." *Harris v. State*, 539 So.2d 1117, 1123 (Ala.Crim.App.1988) (quoting *Sasser v. State*, 494 So.2d 857, 859–60 (Ala.Crim.App.1986)). Moreover, "the prosecutor does have a right to point out to the jury that the State's evidence does stand uncontradicted." *Ex parte Wilson*, 571 So.2d at 1262. In *United States v. Blackwood*, 768 F.2d 131, 139 (7th Cir.), *cert. denied*, 474 U.S. 1020, 106 S.Ct. 569, 88 L.Ed.2d 554 (1985), the United States Court of Appeals for the Seventh Circuit held that the prosecutor's reference to previous statements made by the defendant did not violate the defendant's rights under the Fifth Amendment. The Court of Criminal Appeals has held:

> " 'In evaluating a claim that the prosecutor's statement amounted to a comment on the defendant's failure to testify, "the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ' *Brinks v. State*, 500 So.2d 1311, 1314

(Ala.Crim.App.1986) (quoting *McKissick v. United States*, 379 F.2d 754, 757 (5th Cir.1967)."

Owen v. State, 586 So.2d 958, 960 (Ala.Crim.App.1990), *rev'd on other grounds, Ex parte Owen*, 586 So.2d 963 (Ala.1991).

In *Ex parte Williams*, 461 So.2d 852, 854 (Ala.1984), the prosecutor directly commented on an absence of testimony with regard to a specific circumstance regarding which only the defendant could have testified. In that case the Court of Criminal Appeals held:

> "In a case in which there has been a direct reference to a defendant's failure to testify and the trial court has not acted promptly to cure the comment, the conviction must be reversed. *Whitt [v. State*, 370 So.2d 736, 739 (Ala.1979)]. In a case in which there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute reversible error there must be a virtual identification of the defendant as the person who did not become a witness. *Ex parte Yarber*, 375 So.2d 1231, 1234 (Ala.1979)."

461 So.2d at 854. The court in *Windsor* relied on the rationale of *Ex parte Williams* and reversed the judgment of the trial court because of the prosecutor's comment that "[the defense] can't explain why this weapon was in the defendant's pocket when he was arrested." 593 So.2d at 90. There was no evidence in that case that any other person could possibly offer an explanation.

The present case, however, presents a different set of circumstances. McWilliams stated that the handgun had been on his uncle's person earlier and that the vehicle he was driving belonged to his uncle. McWilliams's uncle could have testified regarding the presence of the handgun in his automobile, but he was not called to testify at all. Sonya McWilliams testified that she had traveled with McWilliams from Mobile to Tuscaloosa; however, she did not offer an explanation for the presence of the handgun in the vehicle.

*1021 We find that the prosecutor's comments did not constitute a direct comment on McWilliams's failure to testify and that the comments did not identify McWilliams as the only possible person who could explain the matters in question. We conclude, therefore, that the content of the prosecutor's closing argument did not constitute "error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.1986), quoted in the excerpt from *Kuenzel, supra*.

IV.

[5] McWilliams asserts that his right to testify in his own defense was violated. The record shows that the following colloquy took place out of the hearing of the jury:

"MR. FREEMAN [the district attorney]: Judge, I still want to point out that perhaps it might be good if the Defendant was asked if he personally agreed with the decision not to testify. I am just thinking down the road.

"THE COURT: Well, Mr. McWilliams is present. Mr. McWilliams, do you understand you have the right to testify?

"MR. McWILLIAMS, THE DEFENDANT: Yes, sir.

"THE COURT: And do you understand that you have the right not to testify?

"MR. McWILLIAMS, THE DEFENDANT: Yes, sir.

"THE COURT: And it is your choice not to testify?

"MR. McWILLIAMS, THE DEFENDANT: *NO ANSWER*

"MR. SOGOL [defense attorney]: Judge, again, I think that would come between Mr. McWilliams and myself, and I had just as soon not discuss it.

"THE COURT: I agree. It was just out of an abundance of caution I asked that.

"MR. SOGOL: Yes, sir."

[6] The right of a criminal defendant to testify at his own trial is fundamental and personal to the defendant. *Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir.1992); *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). "It is basic that every person has the right

in all criminal prosecutions to be heard by himself and counsel, or either ... to testify in his own behalf, if he elects to so do." *Carter v. State*, 424 So.2d 1336, 1340 (Ala.Crim.App.1982) (citations omitted). A criminal defendant's decision not to testify in his own behalf must be made knowingly and voluntarily. *Streeter v. State*, 406 So.2d 1024 (Ala.Crim.App.), *cert. denied, Ex parte Streeter*, 406 So.2d 1029 (Ala.1981), *cert. denied, Streeter v. Alabama*, 456 U.S. 932, 102 S.Ct. 1984, 72 L.Ed.2d 450 (1982).

The record shows that McWilliams was fully aware that he had the right to testify in his own behalf and that he had the right not to testify. The trial court inquired whether McWilliams understood his rights in this regard; and McWilliams had ample opportunity to state his preference whether to testify or not. We find no evidence in the record that either the trial court or McWilliams's counsel interfered with his right to testify in his own behalf. Accordingly, we reject this claim.

V.

[7] McWilliams claims that his Fifth and Fourteenth Amendment rights against double jeopardy were violated in that, he says, he was convicted three times for the same crime.

McWilliams was initially charged under a four-count indictment. Count I of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during a robbery in the first degree while McWilliams was armed with a deadly weapon. § 13A–5–40(a)(2); and *see* § 13A–8–41(a)(1). Count II charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during a robbery in the first degree in which McWilliams caused serious physical injury to Patricia Reynolds. § 13A–5–40(a)(2); and *see* § 13A–8–41(a)(2). Count III of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because *1022 it was committed during a rape in the first degree. § 13A–5–40(a)(3). Count IV of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during sodomy in the first degree. § 13A–5–40(a)(3). Count IV of the indictment was dismissed on the State's motion at the conclusion of its case-in-chief. The jury found McWilliams guilty of the three remaining charges in the indictment, and the court sentenced him to death.

In *King v. State*, 574 So.2d 921 (Ala.Crim.App.1990), the defendant was prosecuted for the rape of his four-year-old daughter. The four-count indictment charged King with two counts of rape (sexual intercourse with a girl under the age of 16 and sexual intercourse with a female by forcible compulsion), and two counts of sexual abuse (sexual contact with a girl under the age of 16 and sexual contact with a female by forcible compulsion). King was convicted on all four counts. He received two life terms for the rape counts and two 20–year terms for the sexual abuse counts. All of the sentences were to run concurrently. *King*, 574 So.2d at 922. Concluding that King's four convictions and multiple sentences for the same act violated his right against double jeopardy, the Court of Criminal Appeals remanded the case to the trial court with instructions to vacate three of the convictions and sentences.

King, however, is not apposite in the present case. In *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the United States Supreme Court addressed the scope of the coverage of the Double Jeopardy Clause, as follows:

> "The Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted). The *Blockburger* [*v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932),] test was developed 'in the context of multiple punishments imposed in a single prosecution.' *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985)."

Grady, 495 U.S. at 516–17, 110 S.Ct. at 2090–91, 109 L.Ed.2d at 561. This Court has also held that the Double Jeopardy Clause of the Alabama Constitution, Art. I, § 9, applies only in the three areas enumerated above. *Ex parte Wright*, 477 So.2d 492 (Ala.1985).

In this case, McWilliams was not prosecuted for the same offense after an acquittal; nor was he prosecuted for the same offense after a conviction. That is, he was not prosecuted twice for the same offense. Moreover, while in

King the defendant received four separate prison sentences for the same offense, McWilliams has only been sentenced to die once and, indeed, can only be put to death once.

In the context of prescribing multiple punishments for the same offense, the United States Supreme Court has stated that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

In the present case, it is clear that the jury knew that it was convicting McWilliams of murdering Patricia Reynolds only once. It is also clear that the jury knew that McWilliams's crime was made capital because his victim was murdered in the course of one robbery and one rape. We conclude, therefore, that the sentencing court has not prescribed a greater punishment than the legislature intended. Even if McWilliams's rights against double jeopardy had been violated by the two convictions of robbery-murder, the convictions for one count of robbery-murder and one count of rape-murder would remain;[4] and either of these would be sufficient to support a death sentence.

*1023 VI.

[8] McWilliams claims that the trial court erred in allowing the jury to separate without his consent. Ala.Code 1975, § 12–16–9(a), provides:

> "(a) If the accused and his counsel and also the prosecuting attorney, in any prosecution for a capital felony consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not."

McWilliams's jury was struck on August 19, 1986; but the jury was not seated and sworn until August 20, 1986. The members of the venire who were not selected to serve on the jury were dismissed on August 20, 1986. The record shows that the entire venire was allowed to separate on the night of August 19, 1986. Because § 12–16–9(a) applies only to the separation of the jury during the pendency of the trial, McWilliams's claim is without merit. *See Stewart v. State*, 601 So.2d 491 (Ala.Crim.App.1992); *Bell v. State*, 475 So.2d 601 (Ala.Crim.App.1984), *aff'd*, 475 So.2d 609 (Ala.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

VII.

[9] McWilliams claims that the trial court erred during the penalty phase in admitting certified copies of two prior criminal convictions and their associated sentences. The convictions were introduced to prove the aggravating circumstance that McWilliams had been "previously convicted of ... a felony involving the use or threat of violence to the person." § 13A–5–49(2).

McWilliams first claims that the trial court erred in admitting the certificates containing the sentences imposed for the prior crimes. The jury was instructed to consider the convictions as aggravating circumstances; but the jury was not instructed to consider the sentences as additional aggravation. Finding no authority to support this claim, we hold that it is without merit.

McWilliams further claims that the trial court erred in admitting the evidence of those prior convictions because they were obtained after the offenses underlying the present conviction were committed. Section 13A–5–39(6) provides:

> "PREVIOUSLY CONVICTED AND PRIOR CRIMINAL ACTIVITY. As used in sections 13A–5–49(2) and 13A–5–51(1), these terms refer to events occurring before the date of the sentence hearing."

See also Ex parte Siebert, 555 So.2d 780, 784 (Ala.1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990). We conclude that this claim is without merit.

VIII.

[10] McWilliams asserts that the guilt-phase and penalty-phase jury instruction on reasonable doubt violated his

right to due process. In his introductory remarks to the guilt-phase jury, the trial court said:

> "The burden of proof in a criminal case is beyond a reasonable doubt and to a moral certainty. Now, don't get confused by those things. Those are synonymous: whatever is beyond a reasonable doubt is also to a moral certainty. Jurists and courts have had trouble for years in defining reasonable doubt. And the easiest definitions I have been able to find are very similar, but they say this: a reasonable doubt is a doubt for which a reason can be given. A reasonable doubt is a doubt for which there is a reason. The doubt which would justify an acquittal must be an actual substantial doubt, not just a possible doubt. It can't be a doubt based on guesswork or speculation or a capricious doubt. A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. The burden is on the prosecution to prove the Defendant guilty beyond a reasonable doubt of every essential element of the crime charged here."

Similarly, in its guilt-phase jury instruction, the trial court charged the jury as follows:

> "The state must prove by the evidence the Defendant's guilt beyond a reasonable doubt. The doubt which would justify an acquittal must be an actual substantial doubt, not just a possible doubt. A reasonable doubt is not a guess or a surmise, *1024 and it is not a capricious doubt. Before a conviction can be had in this case, the State must convince each of you beyond a reasonable doubt and to a moral certainty [of] the Defendant's guilt."

The penalty-phase jury was instructed to apply the same definition of reasonable doubt in determining whether the State had proven the existence of aggravating factors.

We first note that "beyond a reasonable doubt" and "to a moral certainty" are not exactly synonymous. In *Ex parte Beavers*, 598 So.2d 1320, 1321 (Ala.1992), this Court approved a jury instruction that included the following:

> " 'And the expression "to a moral certainty" means *practically* the same thing as beyond a reasonable doubt. Because if you are convinced to a point where you no longer have a reasonable doubt, then you are convinced to a moral certainty.' "

(Emphasis added.) In other words, "moral certainty" is the state a jury reaches when it is convinced of the defendant's guilt beyond a reasonable doubt. We further note, however, that the trial court equated the two phrases only once, at the beginning of his introductory charge to the jury. Moreover, as set out below, the trial court's instruction, taken as a whole, does not suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Accordingly, we hold that this error in the trial court's instruction is harmless. Rule 45, A.R.App.P.

In *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the United States Supreme Court reversed a criminal conviction, holding that the trial court's instruction on reasonable doubt violated the defendant's due process rights. The trial court in that case had equated reasonable doubt with "actual substantial doubt" and had instructed the jury that a reasonable doubt "must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof." *Cage v. Louisiana*, 498 U.S. at 40, 111 S.Ct. at 329, 112 L.Ed.2d at 342 (quoting *State v. Cage*, 554 So.2d 39, 41 (La.1989)). The trial court in *Cage* further instructed the jury that "What is required is not an absolute or mathematical certainty, but a moral certainty." *Id.* The United States Supreme Court concluded that "the words 'substantial' and 'grave' ... suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage v. Louisiana*, 498 U.S. at 40, 111 S.Ct. at 329, 112 L.Ed.2d at 342. It then held

that, considering the use of those words in conjunction with "moral certainty," a reasonable juror could have understood the instruction as allowing "a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* (footnote omitted).

"In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole." *Id.* (citing *Francis v. Franklin*, 471 U.S. 307, 316, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985)). Having compared the instructions at question in *Cage* and those in the present case, we find that the instruction given here does not contain the same infirmity as that in *Cage*. Specifically, the instruction in the present case does not require "a grave uncertainty" for acquittal. [5] Accordingly we reject this claim.

CONCLUSION

Having searched the record and having considered each issue raised by McWilliams, we affirm that portion of the judgment of the Court of Criminal Appeals affirming the conviction. However, for the reasons set forth in Part I above, this case is remanded to the Court of Criminal Appeals with instructions for that Court to remand the case to the Circuit Court of Tuscaloosa County for further proceedings regarding the sentence, consistent with this opinion.

*1025 AFFIRMED AS TO CONVICTION; REMANDED WITH INSTRUCTIONS AS TO SENTENCE.

HORNSBY, C.J., and ADAMS, HOUSTON and STEAGALL, JJ., concur.

All Citations

640 So.2d 1015

Footnotes

1 Our review of a death penalty case allows us to address any plain error or defect found in the proceeding under review. This is so even if the error was not brought to the attention of the trial court. Rule 45, A.R.App.P.

2 The opinion of the Court of Criminal Appeals in that case indicates that the State actually used 9 of its 13 strikes to remove blacks from the venire. However, Bui only challenged the removal of six blacks.

3 According to the opinion of the Court of Criminal Appeals in that case, the record fails to show what happened to two blacks who were originally on the venire.

4 Because each of those crimes contains an element not contained in the other, there could be no possible violation of the prohibition against double jeopardy. *Blockburger, supra; Ex parte Haney*, 603 So.2d 412 (Ala.1992); *Ex parte Henderson*, 583 So.2d 305 (Ala.1991); *Jackson v. State*, 516 So.2d 726 (Ala.Crim.App.1985).

5 In *Gaskins v. McKellar*, 500 U.S. 961, 111 S.Ct. 2277, 114 L.Ed.2d 728 (1991), one of the issues presented in the petition was whether *Cage* announced a new rule. In his opinion respecting the denial of the petition, Justice Stevens indicated that the central flaw in the instruction at issue in *Cage* was that the jury was instructed that a reasonable doubt "must be a doubt as would give rise to a grave uncertainty." *Gaskins* (Stevens, J., concurring in denial of certiorari).

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640 So.2d 982
Court of Criminal Appeals of Alabama.

James Edmund McWILLIAMS
v.
STATE.

6 Div. 190.
|
Aug. 23, 1991.
|
Rehearing Denied May 1, 1992.

Defendant was convicted in the Tuscaloosa Circuit Court, Jerome B. Baird, J., on three counts of capital murder and was sentenced to death by electrocution. Defendant appealed. The Court of Criminal Appeals, McMillan, J., held that: (1) trial court did not abuse its discretion in finding that defendant's evidence of organic brain damage did not rise to level of mitigating circumstance; (2) evidence did not support requested instruction on felony-murder as lesser included offense; (3) prosecutor's comment that jury had not heard explanation for how defendant could have had bullets in his pocket and on floorboard of car without knowing of gun in car was not improper comment on defendant's failure to testify, nor was it plain error; and (4) even if photographic array from which defendant was identified could have been said to be unduly suggestive, witness' in-court identification of defendant was independently reliable.

Affirmed.

Bowen, J., filed dissenting opinion in which Taylor, J., joined.

Affirmed in part, remanded in part, Ala., 640 So.2d 1015,on remand to, Ala.Cr.App., 640 So.2d 1025.

Attorneys and Law Firms

*986 Al L. Vreeland and Albert S. Miles, Tuscaloosa and Oliver W. Loewy, Montgomery, for appellant.

James H. Evans, Atty. Gen., and Sandra J. Stewart and Jean A. Therkelsen, Asst. Attys. Gen., for appellee.

Opinion

McMILLAN, Judge.

The appellant was indicted in a four-count indictment on charges of capital murder: counts I and II of the indictment charging the appellant with committing murder during a robbery in the first degree, in violation of § 13A–5–40(a)(2), *Code of Alabama 1975;* count III charging the commission of murder during rape in the first degree, in violation of § 13A–5–40(a)(3), *Code of Alabama 1975;* and count IV charging the appellant with committing murder during sodomy in the first degree, in violation of § 13A–5–40(a)(3), *Code of Alabama 1975.* Subsequently, count IV of the indictment was dismissed. Following the trial, the appellant was found guilty as charged in counts I through III of the indictment, and following a separate sentencing hearing the jury, by a vote of 10 to 2, recommended a verdict of death. Thereafter, the trial court conducted a separate sentencing hearing, following which the appellant was sentenced to death by electrocution.

This court adopts the trial court's specific findings concerning the circumstances of the crime and the appellant's participation therein, as set forth below:

> "The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.
>
> "Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, *987 the liver, pancreas, stomach, spleen, upper forearms, and hand.
>
> "Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

"The defendant was identified by eyewitnesses who placed him at the scene.

"The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

"The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty."

I

[1] The appellant argues that the trial court denied him an individualized determination of the appropriate punishment by refusing to consider his organic brain damage as a mitigating circumstance. The record indicates that, during the penalty stage of his trial before the jury, the appellant presented evidence that he had suffered two head injuries and that he had visited medical professionals as a result of those head injuries. During his sentencing hearing before the trial judge, the appellant presented evidence indicating that he might suffer from some organic brain dysfunction, although, as that court noted, the report suggesting such dysfunction also indicated that the appellant was exaggerating his problems.

The record further reveals that the trial court did consider this mitigating circumstance, but found that it was not supported by the evidence. In his sentencing findings, the trial court first considered the statutory mitigating circumstances, stating in pertinent part:

"This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.

"Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase; however, after consideration of this evidence, this Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance."

Thereafter, in considering the nonstatutory mitigating circumstances presented by the appellant, the trial court stated:

"In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its advisory verdict to present any other evidence of mitigating circumstances and to make any statement of mitigating circumstances. The defendant testified that he received two blows to the head at various times and places, and this resulted in some organic brain damage.

"Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuropsychological testing, and this request was granted.

"This Court interprets Section 13A–5–47 of the Code of Alabama 1975 as limiting ... what additional evidence may be presented in the 3rd phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

"Nevertheless, the Court reviewed additional evidence presented by the defense as to the result of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor–Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports, the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the *988 preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

"The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance."

" 'It is not required that evidence submitted by the accused as a non-statutory mitigating circumstance be

weighed as a mitigating circumstance by the trial judge.' *Mikenas v. State*, 407 So.2d 892, 893 (Fla.1981).

> " ' "Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance and sentencing is proven and the weight to be given it rests with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla.1979)." *Smith v. State*, 407 So.2d 894, 901 (Fla.1981).' "

Harrell v. State, 470 So.2d 1303, 1308 (Ala.Cr.App.1984), affirmed, 470 So.2d 1309 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985).

> "It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case, the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. *Cochran v. State*, 500 So.2d 1161 (Ala.Cr.App.1984), affirmed in pertinent part, remanded on other part, 500 So.2d 1179 (Ala.1985), affirmed on return to remand, 500 So.2d 1188 (Ala.Cr.App.), affirmed, 500 So.2d 1064 (Ala.1986), cert. denied, 481 U.S. 1033, 107 S.Ct. 1965, 95 L.Ed.2d 537 (1987)."

Haney v. State, 603 So.2d 368 (Ala.Cr.App.1991). See also *Bankhead v. State*, 585 So.2d 97 (Ala.Cr.App.1989), remanded on other grounds, 585 So.2d 112 (Ala.1991) ("[w]hile *Lockett* and its progeny require consideration of all evidence submitted as mitigating, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority").

The trial court clearly found that the evidence presented by the appellant did not rise to the level of a mitigating circumstance. We find no abuse of the trial court's discretion in this regard.

II

The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor–Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor–Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms *989 suggestive of head injury when he was at Taylor–Hardin.

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he

had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.' " The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

[2] The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an expert to testify. The State argues that when the appellant read into evidence the psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).[1] The United States Supreme Court *990 distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> "We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.
>
> > " 'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' [*Estelle v. Smith*], at 465 [101 S.Ct. at 1874].
>
> "We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' *Id.*, at 468 [101 S.Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or

presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, 483 U.S. at 422, 107 S.Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, 483 U.S. at 425, 107 S.Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present case makes the same argument. The United States Supreme Court replied to this argument, stating:

"Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion.... Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about the defendant's mental condition, ..., will be undermined by a decision in favor of the Commonwealth.

"While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required ... and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in *Smith* that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' [*Estelle v. Smith*,] 451 U.S., at 468 [101 S.Ct. at 1875]. Thus, where a defendant does not make an issue of his mental condition, we fail to see how the decision today will undermine *991 *Pate [v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal."

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S.Ct. at 2919, fn. 21.

The holding in *Ake v. Oklahoma*, supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the present case, the appellant was provided with psychiatric assistance; thus the principle of *Ake* was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

[3] Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable ... it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

III

The appellant argues that he was denied the effective assistance of counsel when the trial court refused to give his attorney any time to evaluate the use of the mitigating

evidence of organic brain damage, which was disclosed to him "at the last moment."

[4] Despite the appellant's argument to the contrary, there is no indication in the record that the State interfered with the appellant's right to the effective assistance of counsel, by failing to produce all of his medical records from Holman Prison and all of his medical records from Taylor–Hardin Secure Medical Facility sufficiently in advance of his trial or sentencing hearing. The appellant argues that the medical records were not received until after the penalty stage of his trial before the jury and that this delay prejudiced his case. However, as the State argues, the record indicates that the appellant first requested a psychiatric examination by motion filed on January 21, 1985, which motion was granted on January 29, 1986. The psychiatric examination was conducted at Taylor–Hardin Secure Medical Facility over a period from April 2, 1986, to May 29, 1986. The resulting report was filed with the trial court on June 4, 1986, and copies were provided to defense counsel and the State. Defense counsel argues that the appellant filed a subpoena duces tecum, ordering representatives of Taylor–Hardin to produce medical records on June 18, 1986. On July 18, 1986, the appellant filed a motion to have Taylor–Hardin held in contempt for failing to comply. On July 21, 1986, the trial court ordered Taylor–Hardin to produce all its records relevant to the appellant, and this order was complied with on July 25, 1986. Thereafter, the appellant filed a petition to hold Taylor–Hardin in contempt for failing to produce the actual raw test data, and the trial court ordered these documents produced on July 31, 1986. The order was complied with on August 1, 1986. The appellant's trial began on August 20, 1986, and the jury returned with its verdict on August 27, 1986. Either prior to the trial or prior to the sentencing stage before the jury, which occurred on August 28, 1986, the appellant did not request a continuance to obtain further records. Following the penalty stage before the jury, on September 3, 1986, the appellant filed a motion to show cause, alleging that on August 13, 1986, he had served a subpoena duces tecum on Holman Prison requesting that his psychiatric records be produced and *992 that Holman Prison had failed to comply. This subpoena does not appear in the record. On September 3, 1986, the trial court ordered Holman Prison to produce the psychiatric records before October 1, 1986, and also ordered the appellant's neuropsychological examination, which he had requested, and which was completed on October 3, 1986, with a report being filed on October 7, 1986. The appellant was subsequently sentenced on October 9, 1986.

We find no prejudice to the appellant on the basis of any alleged interference by the State, although there is some indication of delays in providing reports. It is clear from the appellant's own testimony during the penalty phase before the jury, that he had long been aware of his head injuries and that he had sought medical evaluation as to the possibility of any organic brain damage based thereon. As he testified, he had been told that he had none. Moreover, the lunacy commission found no indications of any organic brain damage.

[5] Nor did the trial court err in denying the appellant's motion for a continuance in order for the appellant to have additional time to review the neuropsychologist's report and to consult with an expert about the report.

"Applying the principles of the capital case of *Ex parte Hays*, 518 So.2d 768 (Ala.1986), we find it extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial and that the defendant has not met his burden of showing actual prejudice in the defense of the charge for which he was convicted. In *Hays*, our Supreme Court wrote:

" 'Hays contends that the trial court's denial of his motion for continuance, under the facts of this case, denied him his constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. The Court of Criminal Appeals rejected this argument because Hays failed to show any actual prejudice in the defense of his case as a result of the trial court's denial of his motion. We agree.

" 'The United States Supreme Court in *Morris v. Slappy*, 461 U.S. 1, 11–12, 75 L.Ed.2d 610, 619, 103 S.Ct. 1610, 1616 (1983), recognized that:

" 'Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. See *Chambers v. Maroney*, 399 U.S. 42, 53–54, 90 S.Ct. 1975, 1982–1983, 26 L.Ed.2d 419 (1970). Trial judges necessarily require a great deal of latitude in

scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

" '*See also, Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Connor v. State*, 447 So.2d 860 (Ala.Cr.App.1984). Furthermore, it is evident from recent Supreme Court precedent that, although certain criteria such as the time provided for the investigation and preparation of the case, counsel's experience, the gravity of the charge and complexity of defenses, and counsel's accessibility to witnesses are relevant factors to consider when evaluating effectiveness of counsel, the controlling analysis is whether the action prejudiced the accused in the defense of his or her case. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The accused has the burden of proving prejudice by making a showing that he or she did not receive "a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668 [687], 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). As opined in *United States v. Cronic, supra:*

" ' "The right to the effective assistance of counsel is thus the right of the accused *993 to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred."

" '466 U.S. at 656, 104 S.Ct. at 2045, 80 L.Ed.2d at 666.' *Hays*, supra, 518 So.2d at 771–72."

Fortenberry v. State, 545 So.2d 129, 139–40 (Ala.Cr.App.1988), affirmed, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

In the present case, the appellant has demonstrated no prejudice by the trial court's denial of his motion for continuance. The trial court stated that it had reviewed the report and had found that, while the report indicates that there may have been some indication of organic brain dysfunction, the report also made continual references to the fact that the appellant appeared to be feigning or faking his problems during the examination.

IV

The appellant argues that his right against self-incrimination was violated by the prosecution's presentation of the testimony of the psychiatrist and psychologist who examined him. The appellant cites *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in support of his argument. However, this argument has been held to be without merit under similar circumstances in *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). See discussion at part II.

V

The appellant argues that he was denied his constitutional right to confront the authors of the victim impact statements, which were attached to the presentence report, in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The appellant argues that, even if the victim impact statements did not violate *Booth v. Maryland*, supra, they violated *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1985), in that the appellant was not allowed the opportunity to cross-examine the authors of the victim impact statements.

The appellant's argument that the victim impact statements attached to the presentence investigative report, as well as the testimony of the victim's husband and photographs of the victim, were introduced in violation of *Booth v. Maryland*, supra, is without merit because the United States Supreme Court has recently overruled the applicable holding in *Booth v. Maryland*, supra, and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). See *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In *Payne v. Tennessee*, the victim impact statements included testimony by a family member of the victims and comments made by the prosecutor during his arguments

to the jury. However, the United States Supreme Court noted that in *Booth v. Maryland*, a statute that required the presentence report in all felony cases to include a "victim impact statement" describing the effect of the crime on the victim and the victim's family was at issue. The court indicated that the source of these statements was not a distinguishing feature, stating:

> "Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. Evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional."

In overruling *Booth v. Maryland*, supra, the United States Supreme Court stated:

> "[W]hile virtually no limits are placed on the relevant mitigating evidence a Defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which *994 a defendant 'chose to extinguish,' *Mills* [*v. Maryland*], 486 U.S. [367], at 397 [108 S.Ct. 1860 at 1876, 100 L.Ed.2d 384 (1988)] (Rehnquist, C.J., dissenting), or demonstrating the loss of the victim's family and to society which have resulted from the defendant's homicide. *Booth* reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a ' "mini-trial" on the victim's character.' *Booth*, supra, [482 U.S.] at 506–507 [107 S.Ct. at 2534–2535]. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, 'the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' *Barefoot v. Estelle*, 463 U.S. 880–898 [103 S.Ct. 3383–3397, 77 L.Ed.2d 1090] (1983).
>
> "....
>
> " 'Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309 [110 S.Ct. 1078, 1084, 108 L.Ed.2d 255] (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179–183 [106 S.Ct. 2464, 2470–2472, 91 L.Ed.2d 144] (1986)."

Payne v. Tennessee, supra, 501 U.S. at 822–825, 111 S.Ct. at 2607–2608.

[6] Moreover, the victim impact statements attached to the pre-sentence investigative report were not inadmissible as hearsay which denied the appellant his right to confrontation.

> "It is clear to this Court that the use of the pre-sentencing report is consistent with Ala.Code 1975, § 13A–5–45(d), Alabama's capital murder statute, which states:

" 'Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.'

"The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under Ala.Code 1975, § 13A–5–47. *Thompson v. State*, [503 So.2d 871 (Ala.Cr.App.1986), affirmed, 503 So.2d 887 (Ala.1987), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987)]. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *995 *Johnson v. State*, 399 So.2d 859 (Ala.Crim.App.1979), aff'd in part and rev'd on other grounds, 399 So.2d 873 (Ala.1979)."

Ex parte Davis, 569 So.2d 738, 741 (Ala.1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). "No right to cross-examine was denied, as is contended. Appellant would have been entitled to call, as a witness, any person who could give information about the report, including its author, but apparently chose not to do so." *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991).

[7] The evidence contained in the victim impact statements was relevant to this case, especially in light of *Payne v. Tennessee*, supra, and the defendant was given an opportunity to rebut the evidence. Therefore, there was no error. See *Thompson v. State*, supra; *Kuenzel v. State*, 577 So.2d 474 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991).

VI

[8] The appellant argues that his rights to the presumption of innocence and the reliability of the sentencing trial were undermined when a guard provoked an argument with him in front of several jurors, while he was wearing handcuffs. The record indicates that, after the proceedings had ended on one day of the trial and the jury had been escorted out of the courtroom, a confrontation arose between the defendant and a guard who was to escort the defendant back to his cell. The confrontation apparently began in the courtroom and continued into the hall of the courthouse. The appellant was handcuffed by the guard while in they were in the courtroom and he was then led out into the hall, where words were apparently exchanged—possibly concerning the appellant's guilt or innocence. On the following morning, the jurors were individually questioned as to what they heard or saw concerning the incident, and whether anything they might have seen or heard would prejudice them against the appellant or the State in any way. Each juror who indicated any sort of awareness of the matter testified that he or she would not be prejudiced against the appellant or the State. Thus, the appellant suffered no actual prejudice.

[9] The appellant cites cases which warn against the prejudicial effect of allowing the jury to view a defendant in shackles or handcuffs during his trial. However, in light of the fact that few jurors polled stated that they saw the appellant in handcuffs, and that those that did stated that it would not prejudice them against the appellant, there was no error.

" 'All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner's fate impartially....'

"Not to be overlooked, is the distinction made in *Clark* [*v. State*, 280 Ala. 493, 195 So.2d 786 (1967)], between handcuffing a prisoner in taking him to and from the court and in keeping him in handcuffs while he is being tried, unless there is reasonable ground for belief that such restraint is necessary to prevent his escape or his rescue.

" 'Furthermore, it is not ground for a mistrial that an accused felon appear in the presence of the jury in handcuffs when such appearance is only a part of going to and from the courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried. *Rhodes v. State*, 34 Ala.App. 481, 41 So.2d 623 [(1949)].' *Evans v. State*, Ala.Cr.App., 338 So.2d 1033 [1976], cert. denied, 348 So.2d 784 (1977)."

Taylor v. State, 372 So.2d 387, 389 (Ala.Cr.App.1979). See also *Cushing v. State*, 455 So.2d 119, 121 (Ala.Cr.App.1984) ("[i]t is not ground for a mistrial that the accused appeared before the jury in handcuffs when this appearance was only a part of going to and from the courtroom"). *Campbell v. State*, 484 So.2d 1168, 1170 (Ala.Cr.App.1985) (wherein the court held that the trial court did not abuse its discretion by allowing the jury to see the defendant restrained in shackles where "[t]here is little doubt that the appellant here had substantial reason to attempt to escape, since he faced a sentence *996 of life without parole ..."). Under the circumstances of this case, and in light of the showing of no actual prejudice, we find no abuse of discretion by the trial court in allowing the appellant to be handcuffed for purposes of going to and from the courtroom.

VII

[10] The appellant argues that the jury instructions concerning the especially heinous, atrocious, or cruel statutory aggravating circumstance violated the Eighth Amendment in that they were too vague to adequately guide the jury. He further argues that this aggravating circumstance was not supported by the facts.

The record indicates that, in defining the aggravating circumstances which the jury could consider in arriving at its advisory verdict, the trial court charged:

" 'The capital offense was especially heinous, atrocious, or cruel, compared to other capital offenses.'

"The term 'heinous' means especially wicked or shockingly evil. The term 'atrocious' means outrageously wicked and violent. The term 'cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a criminal capital case is committed."

These instructions were sufficient to overcome the vagueness condemned in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (wherein the United States Supreme Court held that the words "especially heinous, atrocious, or cruel," without more, are unconstitutionally vague, as they fail to sufficiently inform juries of what they must find in order to impose the death penalty). See also *Lawhorn v. State*, 574 So.2d 970 (Ala.Cr.App.1990), affirmed, 581 So.2d 1179 (Ala.1991) (wherein the trial court gave the following instruction to the jury concerning this aggravating circumstance: "[a]nother one that you could consider but is not proven by your verdict is that the capital offense was especially heinous, atrocious, or cruel, compared with other capital offenses as set out in Subdivision 8 defining aggravating circumstances").

[11] However, where sufficient guidance is given to the jury by the trial court's adequately defining the terms used so that the jury is made aware of what it must find in order to impose the death penalty, such an instruction is constitutionally acceptable. See *Proffitt v. Florida*, 428 U.S. 242, 255–56, 96 S.Ct. 2960, 2968–69, 49 L.Ed.2d 913 (1976). In *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991), the appellant challenged a jury instruction concerning this aggravating circumstance, which was similar to the one given in the present case, as unconstitutionally vague. That trial court instructed the jury as follows:

" 'The word "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and vile. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

" 'What is intended to be included in this aggravating circumstance is those cases where the actual commission of a capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.

" 'For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially

cruel, it must be [a] consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness *997 or atrociousness or cruelty exceeds that which [normally] exists when a capital offense is committed.' "

Id. at 385–86. This court held that these instructions met the constitutional standard and sufficiently overcame the vagueness prohibition of *Maynard v. Cartwright*, supra. This court held:

> "These instructions were proper and furnished adequate guidance to the jury. The court's instructions that this aggravating circumstance should apply to the consciousless or pitiless crime which is unnecessarily tortuous to the victim and one in which the brutality exceeds that which is normally present in any capital offense met the requirements of law. See *Proffitt v. Florida*, 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913] (1976); *Ex parte Kyzer*, 399 So.2d 330 (Ala.1981); *Hallford v. State*, 548 So.2d 526 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala.1989), cert. denied [493 U.S. 945], 110 S.Ct. 354 [107 L.Ed.2d 342] (1989)."

Haney, supra, at 386.

[12] Moreover, the trial court properly instructed the jury on this aggravating circumstance because the evidence presented in this case was sufficient to show its existence. The trial court stated:

> "This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery."

The record indicates that the victim bled to death, after having been shot a number of times while she was standing and then lying on the floor, and after having been raped. Her death did not come for two hours after she had been shot. Witnesses testified that, as she clung to a mop in the back of the Austin's Convenience Store, she stated, "It just hurts so bad," and indicated that she "was burning," was "losing it," and that she was having great difficulty breathing. At the hospital, she begged to see her husband and child because she knew she was going to die. The execution-type slaying in this case, the number of shots fired into the victim, and the nature of the victim's suffering all indicate that an instruction on this aggravating circumstance was appropriate. See, e.g., *Lawhorn*, supra ("[w]hen a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by gunshots to the chest, such 'extremely wicked or shockingly evil' action may be characterized as especially heinous, atrocious, or cruel"). *White v. State*, supra ("[e]vidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel").

VIII

[13] The appellant argues that the jury's general verdict recommending the death penalty, without specifying whether any of the statutory aggravating circumstances were found, violated the Eighth Amendment, because it was not "rationally reviewable." However, jury specification of aggravating and mitigating circumstances is not constitutionally required. See *Bush v. State*, 431 So.2d 555, 559 (Ala.Cr.App.1982), affirmed, 431 So.2d 563 (Ala.1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983); *Morrison v. State*, 500 So.2d 36, 42 (Ala.Cr.App.1985), affirmed, 500 So.2d 57 (Ala.1986), cert. denied, 481 U.S. 1007, 107 S.Ct. 1634, 95 L.Ed.2d 207 (1987); *Rutledge v. State*, 482 So.2d 1250, 1259 (Ala.Cr.App.1983), affirmed in pertinent part and reversed on other grounds, 482 So.2d 1262 (Ala.1984); *Whisenhant v. State*, 482 So.2d 1225, 1239 (Ala.Cr.App.1982), affirmed in pertinent part and reversed on other grounds, 482 So.2d 1241 (Ala.1983), affirmed on remand, 482 So.2d 1246 (Ala.Cr.App.1983), reversed on other grounds, 482 So.2d 1247 (Ala.1984).

IX

The appellant argues that the trial court erred by denying his challenge for cause against a potential juror, W.G.G., without allowing him to effectively voir dire the juror about his ability to consider mitigating circumstances and to recommend a life sentence in this case. The record indicates that during *998 the voir dire of the jury venire in this case, the defense counsel asked the following:

"[DEFENSE COUNSEL]: ... And if you find that the State has convinced you beyond a reasonable doubt and to a moral certainty that the Defendant, James McWilliams, is guilty of the things charged in this indictment, and no lesser offense—that is, he is guilty of a capital crime—if you have found him guilty of that crime, then, there would be a second hearing at which that same jury would hear evidence of aggravating and mitigating circumstances. Now, what I am asking is: If you were to serve on this jury, and if you and the 11 people who were on that jury with you were convinced beyond a reasonable doubt that James McWilliams was guilty of a capital offense, is there any person who feels that automatically a death sentence should be imposed? That is, if he was guilty of a capital offense, then, the death penalty would be imposed? Is there anyone who feels that way? If there is, would you please stand?

"PROSPECTIVE JURORS: W.G.G.; T.W.

"THE COURT: [Defense counsel], since you have gone into that, perhaps you should also tell the jury the other punishment that is available.

"[DEFENSE COUNSEL]: I will get to that. Thank you, Judge.

"OTHER JURORS ALSO RESPONDING: R.B.; A.H.; M.S.; D.F.; J.S.; T.O.; C.S.; W.D.W.; M.F.; R.R.; M.B.; D.B.; W.F.; T.K.

"NO FURTHER RESPONSES.

"[DEFENSE COUNSEL]: Now, the law provides for only two punishments if the Defendant is found guilty. And that is a sentence of death or a sentence of life in prison without parole. Those would be the only two sentences available, if that Defendant is convicted of the capital crime as charged in the indictment. Those of you who stood up and said that you believed that if he was guilty of this crime, he should receive a death sentence—those of you who said that—would the fact that you had an alternative of a sentence of life without parole, affect your decision? That is, could you give him life without parole if you were convinced, along with 11 others on the jury, that he was guilty of a capital offense? If you could, those of you who stood up would you stand up again?

"PROSPECTIVE JURORS: W.G.G.

"[DEFENSE COUNSEL]: Mr. G:, would you consider that an alternative punishment?

"JUROR GRAMMER: Yes, sir."

Thereafter, several potential jurors were individually voir dired, among them W.G.G. During that questioning, the following occurred when W.G.G. was being examined by the prosecutor:

"[PROSECUTOR]: Mr. G., earlier you were asked the question that if you were serving on the jury and you reached a decision, along with the other members of the jury, that the Defendant was guilty of capital murder, and you indicated that you would impose the death penalty. Let me ask you this: Although in a given case, in this case you might ultimately arrive at your final decision: that being the death penalty, would you consider the evidence, and consider both life without parole and the death penalty before reaching your final decision?

"[W.G.G.]: Yes, sir.

"Q: All right. I believe that's all.

"RE-EXAMINATION BY [DEFENSE COUNSEL]:

"Q: Mr. G., if you and the 11 other jurors found the Defendant guilty of a capital offense: that is, you found in this case, James McWilliams had done what you were talking about that he had been through, shot the girl during the robbery and whatever else the proof might be, 'being so bold,' as you would still be able to consider mitigating circumstances and recommend a sentence of life without parole?

"[PROSECUTOR]: We object, Your Honor.

"THE COURT: Sustained.

"Q: Would you be able to recommend a life sentence without parole, as opposed to the death sentence, if you had already found him guilty beyond a reasonable *999 doubt of the things that are alleged in this case?

"[PROSECUTOR]: It is not whether he would recommend that, but whether he would consider the two alternatives?

"THE COURT: Sustained.

"Q: I will accept Your Honor's ruling, and stay on my question. I will stand with the question.

"THE COURT: I don't think so. You are asking him to decide it now.

"[DEFENSE COUNSEL]: I am asking a hypothetical question, if he found the defendant guilty, if he were convinced beyond a reasonable doubt that he had done the things alleged in this indictment that you have heard about, and that we have talked about, are you saying that you could consider mitigating circumstances and recommend a sentence of life without parole? Or do you feel that you would have to recommend the death sentence?

"[PROSECUTOR]: We object on the same grounds. The question is not answerable.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: We'll except to Your Honor's ruling that we are asking the jury to pre-judge the evidence. I am asking him to pre-judge on a finding of guilt here, Mr. G. There would be 2 punishments available. Can you consider both of them?

"THE WITNESS: Yes, I could.

"Q: I have no further questions."

Thereafter, the defense counsel challenged W.G.G. for cause, stating that he should be able to ask the witness a hypothetical question. The trial court denied the challenge.

[14] This potential juror clearly indicated that he could consider a sentence of life without parole, as well as a death sentence, and that his views on the death penalty would not prevent or substantially impair his duties as a juror. Therefore, the trial court did not abuse his discretion in denying the challenge for cause.

"The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987). 'The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath notwithstanding his views on capital punishment.' *Dutton v. Brown*, 812 F.2d 593, 595 (10th Cir.), cert. denied, *Dutton v. Maynard*, 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). A juror's bias need not be proved with 'unmistakable clarity' because 'juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.' *Id.*

"A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' *Witt*, 469 U.S. at 429, 105 S.Ct. at 855. That finding must be accorded proper deference on appeal. *Id.* 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' *Nobis v. State*, 401 So.2d 191, 198 (Ala.Cr.App.), cert. denied, *Ex parte Nobis*, 401 So.2d 204 (Ala.1981)."

Martin v. State, 548 So.2d 488, 490–91 (Ala.Cr.App.1988), affirmed, 548 So.2d 496 (Ala.1989), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989).

[15] Moreover, the trial court did not err in "limiting" the defense counsel's ability to question the potential juror on voir dire.

" ' "In the process of selecting the jury from the venire afforded, each party has the right to have questions formulated by it propounded to the jury, either by the court or by the party as the court may determine, if such questions reasonably relate under the circumstances to the question of the qualification or interest or bias on the part of prospective jurors." *Griffin v. State*, 383 So.2d 873, 876 (Ala.Cr.App.), cert. denied, 383

So.2d 880 (Ala.1980), *1000 quoted with approval in *Alabama Power Co. v. Bonner*, 459 So.2d 827, 833 (Ala.1984).'

"*Heath v. State*, 480 So.2d 26, 28 (Ala.Cr.App.1985). It is well settled that the trial court has discretion regarding how the voir dire examination of the jury venire will be conducted, and that reversal can be predicated only upon an abuse of that discretion. *Ervin v. State*, 399 So.2d 894 (Ala.Cr.App.), cert. denied, 399 So.2d 899 (Ala.1981); *Peoples v. State*, 375 So.2d 561 (Ala.Cr.App.1979)."

Bui v. State, 551 So.2d 1094, 1110 (Ala.Cr.App.1988), affirmed, 551 So.2d 1125 (Ala.1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991).

In the present case, the trial court sustained the prosecutor's objection on the ground that the formulation of defense counsel's questions required the potential juror to decide which sentencing alternative he would choose if he found this appellant guilty. The defense counsel was allowed to elicit from the potential juror whether he would consider a sentence of life imprisonment without parole. Therefore, we find no abuse of discretion by the trial court.

X

The appellant argues that the prosecutor undermined the reliability of the jury's advisory verdict because of comments made during his closing argument in the penalty phase before the jury. The appellant cites seven different instances of alleged improper prosecutorial comment.

The first comment by the prosecutor concerned the aggravating circumstances which he claimed to be applicable to the case. He stated that among these circumstances he expected that the trial court would charge "that the capital offense was committed by a person under sentence of imprisonment." He further stated that evidence had been presented that the appellant had been previously convicted on two occasions. The defense counsel objected, noting that "[t]he courts have interpreted that as being a person who was in prison at the time the crime was committed." The trial court sustained defense counsel's objection. The prosecutor then acknowledged, "I am incorrect: the first one [above-quoted aggravating circumstance] is not the applicable one." The appellant did not request a curative instruction and none was given. Thereafter, during its oral charge to the jury, the trial court instructed the jury on the aggravating circumstances which could properly be considered. " 'The general rule is that prejudicial statements, even though improper, are considered capable of being eradicated by the trial court in sustaining objections thereto or by appropriate instructions to the jury or both. *Meredith v. State*, 370 So.2d 1075 (Ala.Crim.App.), *cert. denied*, 370 So.2d 1079 (Ala.1979).' *Bui v. State*, 551 So.2d 1094 (Ala.Crim.App.1988)." *Holladay v. State*, 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989).

[16] The appellant also cites a comment made by the prosecutor as he was addressing the applicability of each statutory mitigating circumstance to this case. The prosecutor stated:

> "Two, the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. He has a mental problem in this sense: that he has a mind which is just criminal. He is just bad. What else can you say? He is a dangerous man, and he has proven it."

The appellant argues that, by this comment, the prosecutor argued that the jury could not consider his alleged psychiatric problems. However, it is clear that the prosecutor was arguing that the statutory mitigating circumstance that "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," did not apply to the facts and evidence presented in this case.

[17] The appellant argues that the prosecutor's argument suggested that only statutory mitigating circumstances could be considered by the jury. The appellant bases his argument on the fact that the prosecutor listed the statutory mitigating circumstances and commented on each one. However, in *1001 *Bankhead v. State*, 585 So.2d 97 (Ala.Cr.App.1989), the prosecutor raised the same argument. This court found no impropriety in the fact that "[i]n closing argument, the State went down the

list of statutory mitigating circumstances, contending that none of these applied." *Bankhead*, supra, at 107.

The record further indicates that following the prosecutor's listing of the statutory mitigating circumstances the defense counsel objected on the basis that the list of statutory circumstances was not inclusive and that other circumstances may be considered. The trial court responded, "Counsel has the right to argue the law, but the Court will be the final authority on the law." The trial court then sustained the appellant's objection. The action of the trial court eradicated any error. See *Holladay*, supra, at 131, and cases cited therein. Moreover, during his oral charge to the jury, the trial court clearly instructed the jury that nonstatutory mitigating circumstances were to be considered by the jury, as well as the statutory mitigating circumstances. The trial court listed and described the pertinent nonstatutory mitigating circumstances.

[18] The appellant also cites as error the following prosecutorial argument:

> "Let me comment on the reasons for penalties, as I see it, or as I think all of you would agree. One reason is to rehabilitate somebody, to change their behavior and make them a good citizen. Is rehabilitation applicable in this case? I submit to you no, it is not. Another one is retribution, just punishment. And I think that society has a need to feel that when a man does the horrible crime that this man has committed, that people out there need to feel and know that the system works, and that the man has been punished to the degree that he can be punished in our society, which, in this case, is the maximum sentence. Another one is deterrent: that is, to deter—in other words, the punishment that might be applied to one defendant hopefully will deter others from thinking about committing the same kind of crime. Isn't that applicable in this case?"

Deterrence, retribution, and society's right to self-defense have all been held to be proper subjects of prosecutorial argument. See, e.g., *Rutledge v. State*, 523 So.2d 1087, 1100 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988) ("[i]t is proper to argue deterrence in a sentencing phase closing argument"). *Holladay v. State*, 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (retribution argument was held proper). *Kuenzel v. State*, supra (argument concerning society's right of self-defense was held proper).

[19] **[20]** The appellant cites as error the following statements made by the prosecutor:

> "Then when he had satisfied that animal lust of his and reached an ejaculation, that is how that happened to be on her slacks.... I am suggesting to you that it is your duty, your obligation under the facts of the evidence in this case, to do that: to carry out your job as it should be done because we have to cut out a cancer sometimes."

As to the prosecutor's reference to the appellant's "animal lust":

> " 'The prosecutor's statements are not evidence. *Henry v. State*, 468 So.2d 896, 899 (Ala.Cr.App.1984), *cert. denied*, 468 So.2d 902 (Ala.1985). Further, prosecutors are to be allowed a wide latitude in their exhortations to the jury. *Varner v. State*, 418 So.2d 961 (Ala.Cr.App.1982). "Statements of counsel and argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict." *Orr v. State*, 462 So.2d 1013, 1016 (Ala.Cr.App.1984).'
>
> "*Armstrong v. State*, 516 So.2d 806, 809 (Ala.Cr.App.1986). Furthermore, '[t]he trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Garrett v. State*, 268 Ala. 299, 105 So.2d 541 (1958); *Hurst v. State*, 397 So.2d 203 (Ala.Crim.App.), cert. denied, 397 So.2d 208 (Ala.1981).' *Henderson v. State*, 460 So.2d 331, 333 (Ala.Cr.App.1984).

"... '[A] prosecutor as well as defense counsel has a right to present his impressions *1002 from the evidence,' and '[h]e may argue every legitimate inference from the evidence and may examine, collate, sift, and treat the evidence in his own way.' *Watson v. State*, 398 So.2d 320, 328 (Ala.Cr.App.1980), writ. denied, 398 So.2d 332 (Ala.1981), cert. denied, 452 U.S. 941, 101 S.Ct. 3085, 69 L.Ed.2d 955 (1981)."

Henderson v. State, 584 So.2d 841, 856 (Ala.Cr.App.1989), remanded, 584 So.2d 862 (Ala.), affirmed, 587 So.2d 1071 (Ala.Cr.App.1991).

As to the prosecutor's reference to the appellant as a "cancer that needed to be 'cut out' " of society, "the law is clear that '[i]n a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case.' " *Pierce v. State*, 576 So.2d 236 (Ala.Cr.App.1990), cert. denied, 576 So.2d 258 (Ala.1991), quoting *Nicks v. State*, 521 So.2d 1018, 1023 (Ala.Cr.App.1987), affirmed, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988).

[21] The appellant contends that the prosecutor erred in arguing that the victim was raped from behind, because, he argues, this fact was not supported by facts introduced into evidence. However, there was evidence that there was semen found on certain places on her slacks, which were still around her lower legs when she was found. Thus, this argument was proper as a reasonable inference to be drawn from the evidence. See *Henderson v. State*, supra.

[22] The appellant cites three instances in which he claims that the prosecutor injected his personal opinion into the closing argument. The appellant appears to be referring to the prosecutor's comments that society needed protection and that the evidence presented concerning the appellant's mental state indicated not that he was mentally ill, but rather that he was simply mean. This argument was based on the report from the lunacy commission stating that the appellant did not have a mental defect, but rather had a character defect and repercussions from that defect. " 'While it is never proper for the prosecutor to express his personal opinion as to the guilt of the accused during closing argument, reversible error does not occur when the argument complained of constituted mere expression of opinion concerning inferences, deductions and conclusions drawn from the evidence.' *Sams v. State*, 506 So.2d 1027, 1029 (Ala.Cr.App.1986)." *Henderson v. State*, supra.

[23] In reviewing claims of improper prosecutorial argument, comments made by the prosecutor must be examined in the context of the entire trial. *Duren v. State*, 590 So.2d 360 (Ala.Cr.App.1990). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, [2471] 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1975)." *Bankhead v. State*, 585 So.2d 97 (Ala.Cr.App.1989). We find no denial of due process resulting from the prosecutor's comments during his closing statement, nor do we find any error in those comments.

XI

[24] The appellant argues that he was denied his rights to due process by the trial court's refusal to instruct the jury on a lesser included offense of felony murder, because he argues that a rational jury could have found that the robbery was committed by two men and that the appellant was not the triggerman or an accomplice to the murder. However, the evidence presented at trial clearly indicates that the appellant was not entitled to such a charge. There was no reasonable theory which could have been drawn from the evidence to support the appellant's contention that the jury might have concluded that there were two men involved. The appellant bases his argument on the fact that certain of the identifications given by witnesses varied and did not perfectly match the appellant. However, each of these witnesses positively identified the appellant as the man they saw at the time of the offense. The appellant was identified as the man present *1003 during the offense; he was found with the murder weapon in his possession; and the victim's dying declarations clearly indicated that there was only one man involved.[2]

"In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United States Supreme Court held that the sentence of death could not be imposed after a jury verdict of guilt of a capital offense when

the jury was precluded from considering a verdict of guilt of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. Subsequently, in *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1981), the Supreme Court clarified its decision in *Beck, supra*, to require that only when the evidence warrants such an instruction must a lesser included offense instruction be given. In so holding, the Court upheld the constitutionality of the following Alabama standard as applied in capital cases: 'a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." ' *Hopper*, 456 U.S. at 611, 102 S.Ct. at 2053 (quoting *Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973))."

Ex parte Julius, 455 So.2d 984, 986 (Ala.1984), cert. denied, 469 U.S. 1132, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985). The appellant was not entitled to a charge on felony murder because there was no reasonable theory from the evidence which would have supported such a charge.

XII

The appellant argues that the prosecutor used inadmissible hearsay testimony concerning Jerry Porter's alibi to disprove the defense theory that the appellant was mistakenly identified as the killer. The record indicates that, shortly following the offense, the police received information incriminating Jerry Porter in the instant offense. Thereafter two of the witnesses to the offense "tentatively identified" Jerry Porter as the man they had seen at the scene of the offense. During the trial, on cross-examination of State's witness Officer Robert McFerrin, the defense counsel asked about any information which had been received regarding Jerry Porter. McFerrin testified that he had received information from an informant that Jerry Porter was seen in the vicinity of Austin's Food Store at approximately 10:00 p.m. on the night of the offense. The informant described Porter as wearing khaki pants, a brown coat, and a white shirt; this description apparently matched the description of the killer which had been run in the local newspaper following the murder. The informant further stated that Porter was carrying a sack of coins and paper money on that night.

On redirect examination, the prosecutor asked Officer McFerrin why no charges had ever been brought against Jerry Porter, and the witness testified that the police discovered that the informant was Porter's ex-girlfriend, who later admitted that she had lied about the identification in order "to get even" with Porter. Officer McFerrin testified that, after investigating Porter, they discovered that he had been in Sylacauga on the night of the murder.

[25] Although the appellant argues that Officer McFerrin's testimony on redirect examination concerning the recanting of the informant's identification of Porter, violated his right of confrontation and was inadmissible hearsay, we note that the appellant "opened the door" for the introduction of this testimony by eliciting testimony from Officer McFerrin as to what the informant had told him concerning Jerry Porter. See *Ringer v. State*, 489 So.2d 646, 652 (Ala.Cr.App.1986); *Loyd v. State*, 580 So.2d 1370 (Ala.Cr.App.1990), reversed on other grounds, 580 So.2d 1374 (Ala.1991); *Hollingsworth v. State*, 549 So.2d 110 (Ala.Cr.App.1988); *Campbell v. State*, 508 So.2d 1186 (Ala.Cr.App.1986). See also *Garrett v. State*, 580 So.2d 58 (Ala.Cr.App.1991) ("[t]he record reveals that the appellant opened these matters up during cross-examination; therefore, they were *1004 properly within the scope of the State's re-direct examination").

[26] Moreover, the appellant failed to object to this testimony at trial and, even if the testimony was hearsay, its admission does not rise to the level of plain error as defined by Rule 45A, A.R.App.P. See *Ex parte Womack*, 435 So.2d 766, 769 (Ala.1983), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983); *Ex parte Harrell*, 470 So.2d 1309, 1313 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985); *Ex parte Watkins*, 509 So.2d 1074 (Ala.1987), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

XIII

The appellant argues that he was denied a fair trial by the prosecutor's impeachment of the appellant's wife, Sonya Smith McWilliams, through an incriminating prior inconsistent statement, without producing the witness to whom the statement was allegedly made. The record indicates that the appellant, his pregnant wife, and their child were staying in the apartment of Cynthia Love at the time of the offense. Cynthia Love had been a good friend of the appellant's wife. On cross-examination of the appellant's wife, the following occurred:

"[PROSECUTOR]: Now, there at the time when you returned the key, I will ask you at that time and place, if you would have made this statement to [Cynthia Love]: that you were on the telephone across from the apartment, and that James [the appellant] went across the street to Austin's Convenience Store. Did you make that statement to Cynthia Love there at that time and place?

"[APPELLANT'S WIFE]: No, I did not."

The appellant did not object to this remark, but later made a motion for mistrial based on the prosecutor's question. The prosecutor submitted that Cynthia Love had been subpoenaed as a State's witness and that she had been reliable in the past. The prosecutor testified that Cynthia Love never appeared to testify and therefore was never called to impeach the appellant's wife. The trial court subsequently instructed the jury as follows:

"Before we begin the arguments of counsel, ladies and gentlemen, I want to give you this instruction: the State has attempted to impeach Sonya Smith McWilliams [the appellant's wife] by showing prior inconsistent statements made to Cynthia Love. Cynthia Love has not testified to those statements, and thus Sonya McWilliams has not been successfully impeached. I instruct you ladies and gentlemen that you cannot consider statements allegedly made to Cynthia Love and denied by Sonya Smith McWilliams in weighing the credibility of Sonya McWilliams."

"It is generally agreed that, when a witness is called to testify to a material issue in the case, the party against whom the witness is called may impeach his credibility by proving that he has previously made statements that are inconsistent with his present testimony. These prior statements of self-contradiction can be introduced either through the cross-examination of the witness or, under limiting rules ... by introducing other witnesses who will testify to the inconsistent statement."

C. Gamble, *McElroy's Alabama Evidence*, § 155.02(1) (4th ed. 1991).

> "When a witness, on cross-examination, denies that he made a statement out of court which is inconsistent with his testimony on direct examination, the only available move for the impeaching party is to bring on an impeaching witness who can testify as to the prior inconsistent statement of the witness being impeached."

C. Gamble, *McElroy's Alabama Evidence*, § 157.01(1) (4th ed. 1991). Although the prosecution laid a proper predicate for the impeachment of the appellant's wife through her prior inconsistent statements made to another witness, because the other witness (Cynthia Love) never testified, the appellant's wife was never impeached.

Moreover, the prosecutor's testimony at trial establishes that he intended to produce the testimony of Cynthia Love. The following transpired following the defense counsel's motion for mistrial:

"[PROSECUTOR]: The witness obviously is not available, Judge, but I was assured *1005 last night —I talked to two people, both of whom claimed to be the mother of Cynthia Love. I think I determined which one was the correct one, and that one told me that she felt very certain that she would be able to have Cynthia here this morning at 9:00. I assured her that we would try to pay her expenses or whatever. There is no way I could know whether she was going to appear here or not. Now, she obviously did not appear. I don't know where she is; she was under subpoena.

"[ASSISTANT PROSECUTOR]: And our impeaching of her was just not done arbitrarily, Your Honor. We had had a statement taken by Ms. Cynthia Love; we have been in contact with Ms. Love, and Ms. Love has been here, was under subpoena, and told that we may need her in rebuttal on these particular facts that were brought out in court. And we did have statements and the things that were offered in impeachment of Mrs. Sonya Smith McWilliams [were] done in good faith. And our witness just didn't pan out, just didn't show up."

"It is becoming increasingly clear that one does not have an unbridled and absolute right to ask about a prior inconsistent statement. Rather, the cross-examiner must have some reasonable grounds and good faith upon which to believe that such a statement was in fact made." C. Gamble, *McElroy's Alabama Evidence*, § 156.01(7) (4th ed. 1991), citing *Wysinger v. State*, 448 So.2d 435 (Ala.Cr.App.1983).

[27] Because of Cynthia Love's unavailability, the appellant's wife was not impeached. Also, because she denied having made the statement, any possible prejudice to the appellant was lessened. Moreover, because the prosecutor provided evidence that he undertook the impeachment in good faith and that he had reasonable grounds to believe that Cynthia Love would be present to testify as to the prior inconsistent statement, and also, in light of the trial court's instructions to the jury, we find no prejudice to the appellant as a result of the prosecutor's statements.

XIV

[28] [29] The appellant argues that the trial court interfered with his right to confront his accusers because he was not allowed to impeach an inmate informant by questioning him about his decision to cooperate with the authorities in this case. Two inmates who had been incarcerated with the appellant following his apprehension in Ohio testified for the State, concerning statements which the appellant had allegedly made to them while he was in prison. One of the witnesses, Ronnie Hands, testified on cross-examination as follows:

"When you talked to Investigator Helm and told him you didn't know anything, and you went back and talked to Anthony Finn [the other inmate] did you tell Anthony Finn what they wanted?

"A. I just told him they was asking questions about him.

"Q. About [the appellant]?

"A. Yeah.

"Q. You told Anthony Finn that?

"A. Yeah.

"Q. What else did you tell him?

"A. That's it.

"Q. Did Anthony say he was going to talk to somebody?

"A. He didn't say.

"Q. You and Anthony didn't talk?

"A. Probably. Not really, no.

"Q. And you knew that [the appellant] had come from Alabama? Right?

"A. Well, I didn't know until he told me.

"Q. Well, he told you he had come from Alabama? Right?

"A. Yeah.

"Q. And you got all this information from [the appellant]? Right: that you have testified to?

"A. Yeah.

"Q. And you didn't get any of it from Anthony Finn?

"A. No.

"Q. And you and Anthony Finn never talked about what was said by [the appellant]?

"A. No.

*1006 "Q. You never compared notes about what you knew?

"A. No."

Thereafter, on cross-examination of the other inmate, Anthony Finn, who actually shared a cell with the appellant, the following transpired:

"Q. Did you have occasion to talk with Ronnie Hands about the prosecution wanting some information about [the appellant]?

"A. Yes.

"Q. And when you talked to him, what did he tell you?

"[PROSECUTOR]: We object to hearsay, Your Honor.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: Your Honor, Mr. Hands testified he never had a conversation.

"[PROSECUTOR]: No, he didn't. He said he did talk to him, Your Honor, and we would object to the nature of any content of any conversation as hearsay.

"[DEFENSE COUNSEL]: Judge, how am I supposed to impeach Mr. Hands, if I don't know what they said?

"THE COURT: I will sustain.

"[DEFENSE COUNSEL]: We except, Your Honor."

The appellant argues that there was evidence that both inmates received lighter sentences because of their cooperation in this case and that, through this questioning, the appellant sought to produce evidence that the two inmates had fabricated their stories so as to receive this beneficial treatment. The appellant argues that the trial court's sustaining of the prosecutor's hearsay objection limited his ability to impeach the inmates. The appellant also argues that the alleged conversation was not hearsay because it was offered for the purpose of impeachment. However, the record indicates that immediately following the trial court's sustaining of the prosecutor's objection and the defense counsel's exception to the trial court's ruling, defense counsel was allowed to ask the following:

"Q. Did you ever talk to Ronnie Hands about the things that [the appellant] said to you or to him?

"A. No.

"Q. You never talked to him about that.

"A. No."

Thus, the defense counsel was allowed to rephrase his question so that it was not as broad, and he received an answer to his question. Therefore, even if the hearsay testimony should have been allowed for the limited purpose of impeachment, any error was harmless, because the defense counsel was allowed to elicit an answer concerning this question. See *Walker v. State*, 581 So.2d 570 (Ala.Cr.App.1991) (wherein defense counsel's question, which was preliminary step to impeachment, should have been admitted; however, the error was harmless). Moreover, based on the defense counsel's formulation of the initial question we do not find that the trial court abused its discretion in sustaining the prosecutor's objection. See C. Gamble, *McElroy's Alabama Evidence* § 21.01(1)(3), (4th ed. 1991).

[30] The appellant argues that the trial court denied the appellant the effective assistance of counsel by overruling an objection to the testimony of prison inmates concerning the appellant's confession, without determining whether the inmates were agents of the State. There is no indication in the record that either inmate was working as an agent of the police. There was further evidence that none of the Alabama officials had promised the inmates anything in return for their testimony. However, there was an indication that certain charges were lessened or dropped against these inmates by the Ohio officials in return for their testimony. The record indicates that these arrangements were made after the appellant had been transferred and after he had made the confessions to the inmates.

During the testimony of one of the inmates, defense counsel objected, citing *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Although the trial court overruled the objection, the prosecutor subsequently asked the inmate whether he had coerced or threatened the appellant or had promised anything in return for making *1007 this confession. The inmate stated that he had not.

" '[W]hen an accused volunteers a confession to a person who is not a law enforcement official or agent and has no connection whatever with law enforcement authorities, who has no interest whatever in the prosecution of the accused, is not in a position to promise or give the accused anything to compensate for his confession or to harm him for not making a confession, and there was no occasion whatever on the part of the person to whom the confession was made to have threatened the defendant if he did not confess or to make him any promise if he did confess, the confession under such circumstances is voluntary and admissible in evidence. *Ellis v. State*, Ala.Cr.App., 338 So.2d 428, 432 (1976); *Kircheis v. State*, 56 Ala.App. 526, 323 So.2d 412 (1975), *cert. denied*, 295 Ala. 409, 323 So.2d 421.'

"*Primm v. State*, 473 So.2d 547, 553 (Ala.Cr.App.1984). See also *Warrick v. State*, 460 So.2d 320, 323 (Ala.Cr.App.1984); *Hinshaw v. State*, 398 So.2d 762, 764 (Ala.Cr.App.), *cert. denied*, 398 So.2d 766 (Ala.1981)."

Jackson v. State, 502 So.2d 858, 862 (Ala.Cr.App.1986).

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Because the statement was voluntarily made to persons who were not law enforcement officers or agents, the appellant was not entitled to counsel or constitutional warnings prior to making his statement. *McCall v. State*, 501 So.2d 496, 500 (Ala.Cr.App.1986); *Jackson v. State*, supra, and cases cited therein.

XVI

[31] The appellant argues that he was denied a fair trial because of improper comments made by the prosecutor during his closing argument at the guilt phase. The appellant refers to the following arguments made by the prosecutor:

"I can assure you, I believe all of us in this room believe that this is real, and the gun in this case, which you have seen, that is real; the slacks which you have seen, that's real, showing the evidence of the semen—that's real; the only thing that is not real here today is Patricia Vallery Reynolds. She is, unfortunately, not here today, our best witness. The only evidence we have of her is her clothing, her key chain, and that picture (indicating). I wish she were here today with her family, and could testify about what happened. But she is not, and that is why we are here."

"Both of them talk about, they keep saying that our witnesses picked out Jerry Porter, and that they identified Jerry Porter. That's not correct, now, and you heard the evidence. They said it looked like him, but none of them said it was him: not a single one of them. They all said yes, that looked very much like him. And when you—

"[DEFENSE COUNSEL]: I am going to object to that as a misstatement of the evidence. The evidence was that they—the testimony was that they tentatively identified him as the one who was in the store. That was exactly what the officer testified to concerning Mr. McDaniel.

"THE COURT: The jury is aware of the evidence. I will note your objection."

"[PROSECUTOR]: Now, [Defense Counsel] attacked our witnesses: Marsh, Thomas. He talked about the Porter case, and the friends supposedly alibiing. The Tuscaloosa County Homicide Unit investigated that case thoroughly, and they concluded conclusively that that man had nothing to do with it.

"[DEFENSE COUNSEL]: I am going to object. There's no evidence of any conclusive determination by any homicide investigation.

"THE COURT: I will note your objection.

"[DEFENSE COUNSEL]: Could I have a ruling?

"THE COURT: Overruled."

"[PROSECUTOR]: He was going north. Why? Because he was fleeing from the crime; it looked like things were focusing in on him; he was not supposed to have been a suspect until Investigator Rester's card turns up on his door. And he is afraid that now he is a suspect. And the *1008 brown coat, he said, '[w]here is it?' Well, of course, we know that Trooper Elder didn't take the clothing he was wearing. It was cold up in Ohio in January, so he got his clothes back. He had to have gotten those.

"[DEFENSE COUNSEL]: I am going to object to that as not being a correct statement of the evidence, Your Honor.

"THE COURT: Again, the Court doesn't make rulings on the evidence. That is up to the jurors."

> "[PROSECUTOR]: And as to what happened to the khaki pants, I don't know. But I suspect they had blood on them. I suspect that he got rid of them."

"All right, sir. And of course as far as printing the gun, this Defendant wasn't even a suspect for several weeks. They didn't know to print the gun. I think it was obvious that Sonya intended to be misleading and untruthful. And that's why I cross-examined her about what she could see from that phone to the apartment. She was trying to tell you that she was there on the phone and could see the door the whole time, and that she could have seen him come and go. But when I showed her obvious physical evidence, she admitted that she was not correct. And as for what Sonya told Chief Miller as to when this Defendant had the gun in Mobile, they were talking about in context of this crime, and—

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"[DEFENSE COUNSEL]: Your Honor, I am going to object again. There is no evidence as to when that reference was to. I specifically asked Investigator Miller; he said there was no way he knew. I object; that is a misstatement of the evidence.

"[PROSECUTOR]: It is a fair inference.

"THE COURT: The jury is aware of the evidence."

The above-quoted prosecutorial comments were proper inferences or conclusions drawn from the evidence. The prosecutor could properly conclude the victim was dead, that Jerry Porter was never positively identified, that the information pertaining to Jerry Porter had been investigated and that the police had determined that Porter was in Sylacauga on the night of the murder, that the appellant might have gotten rid of the khaki pants and brown coat which he was seen wearing on the night of the offense, and that the appellant's wife was untruthful in testifying that she was able to see the apartment from the telephone booth.

"[PROSECUTOR]: He talked about the fingerprints. You know I didn't hear any mention of Jerry Porter's fingerprints in that story either. You heard the officers say that they rarely ever are able to get prints in a robbery. Certainly they are going to have a lot of prints because people work there day in and day out.

"[DEFENSE COUNSEL]: Your Honor, I object to that as misleading the jury. There is no evidence Jerry Porter's fingerprints were ever sent for comparison.

"THE COURT: Sustained."

[32] As to the prosecutor's comment concerning the lack of evidence of any of Jerry Porter's fingerprints being found in Austin's food store, there was no evidence introduced that any of Jerry Porter's fingerprints were found or even sought out for purposes of comparison. The trial court sustained defense counsel's objection and, although it gave no curative instructions, we do not find that the prosecutor's argument was so unreasonable as to amount to plain error. *Dixon v. State*, 476 So.2d 1236 (Ala.Cr.App.1985) (prosecutor's argument attempting to inject criminal record of defense witness into evidence was cured by trial court's sustaining of objections and giving instructions to the jury that there was no evidence of prior criminal conduct of the witness). See also *Holladay v. State*, supra, at 131, quoting *Bui v. State*, supra (wherein it was held that improper prejudicial statements are generally considered eradicated when the trial court sustains the defendant's objection or gives curative instructions or both).

"[PROSECUTOR]: Now, I submit to you that we have proven beyond a reasonable doubt, the evidence on each of the counts of the indictment that you will have before you. When I talk about reasonable, defense attorneys sometimes would have you believe that that is with certainty. That is not what the law says, and I would ask you *1009 to listen when the Court explains the applicable law to you. Reasonable doubt is simply a doubt for which you can give a good reason: not conjecture, speculation. Sure, you could speculate about all kinds of things, but you should make your decision based only on the evidence that you have heard. The burden of proof in this case is the same in any case when the State has prosecuted. And that burden is overcome every day. Obviously people commit crimes, and people get convicted of them. It is like the Scales of Justice. I know all of you have seen that. We have to balance those scales. It is not overcoming the burden of proof for the State; it is not some impossibility."

"And the people's rights, now, need to be enforced; people have a right to live free from crime and criminals. It is time for you to fulfill your obligation.

"[DEFENSE COUNSEL]: Judge, we are going to object to this line of argument as being illegal [based] on the cases cited by the Eleventh Circuit.

"THE COURT: I will sustain.

"[PROSECUTOR]: All right, sir. I would like to ask you to think about this for a minute. We have talked about all of the witnesses except one. Unfortunately she is not a witness in body. But imagine, if you will, how Patricia Vallery Reynolds felt. You know, we are here in a rather sterile, sometimes it may seem cold atmosphere of the courtroom. But it is abstract: we can sit back and look and see what happens, and think about it, talk about it, and so forth. But the crime happens within the hot lights of violence. And I wonder how she felt that night? The fear—

"[DEFENSE COUNSEL]: Your Honor, I am going to object. This is pleading sympathy from the jury; it is not proper, and we do object.

"THE COURT: Sustained."

[33] The prosecutor's comments concerning the jury's obligation and "justice" were proper comments as an appeal by the prosecutor for law enforcement. See e.g. *Ex parte Waldrop*, 459 So.2d 959, 961-62 (Ala.1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Allen v. State*, 462 So.2d 1031, 1035 (Ala.Cr.App.1984). The appellant argues that this summation by the prosecutor was a "patently improper emotional appeal"; however, this court has upheld similar comments during a prosecutor's closing. See e.g. *Rutledge v. State*, 523 So.2d 1087 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988); *Lewis v. State*, 456 So.2d 413 (Ala.Cr.App.1984).

> "[PROSECUTOR]: You know one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the arm rest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show you any other explanation for it."

[34] The appellant objects to the above-quoted comment, alleging it constituted a comment on his failure to testify. No objection was made to this comment at trial.

> " 'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.*' *Ex parte Kennedy*, 472 So.2d [1106] at 1111 [(Ala.1985)] (emphasis in [Kennedy]). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright*, 778 F.2d 623, 629 n. 6 (11th Cir.1985), *cert. denied*, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously *1010 affect the fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), *cert. denied*, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986). See also *Biddie v. State*, 516 So.2d 837, 843 (Ala.Cr.App.1986), *reversed on other grounds*, 516 So.2d 846 (Ala.1987)."

Kuenzel v. State, 577 So.2d 474, 489 (Ala.Cr.App.1990).

> " 'In evaluating a claim that the prosecutor's statement amounted to a comment on the defendant's failure to testify, "the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ' *Brinks v. State*, 500 So.2d 1311, 1314 (Ala.Crim.App.1986) (quoting *McKissick v. United States*, 379 F.2d 754, 757 (5th Cir.1976)). See also *Marsden v. Moore*, 847 F.2d 1536 (11th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *Daly v. State*, 442 So.2d 143 (Ala.Crim.App.1983)."

Owen v. State, 586 So.2d 958 (Ala.Cr.App.1990).

While we are mindful of the similarity between this comment and the prosecutorial comment made in *Windsor v. State*, 593 So.2d 87 (Ala.Cr.App.1991), in that case, the prosecutor commented, while pointing at the appellant, that "he cannot explain why he had the deceased's pistol in his possession at the time of his arrest." Defense counsel vigorously objected to the comment and noted that the prosecutor had pointed at the defendant or the table at which the defendant was seated when he made this statement. This gesture emphasized the defendant's role as the only and obvious party to properly refute the evidence.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the

> task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. *Whitlow v. State*, 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State*, 448 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State*, 404 So.2d 89, 97 (Ala.Cr.App.1980), *cert. denied*, 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel and argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. *Orr v. State*, 462 So.2d 1013, 1016 (Ala.Cr.App.1984); *Sanders v. State*, 426 So.2d 497, 509 (Ala.Cr.App.1982)."

Bankhead, supra. See also *Duren*, supra.

As this court noted in *Windsor*, supra, the Alabama Supreme Court has indicated that a prosecutor's comment on a defendant's failure to testify is subject to the harmless error rule. *Id.*, citing *Ex parte Wilson*, 571 So.2d 1251, 1265 (Ala.1990). In light of the prosecutor's entire argument, we do not believe that the comment made in the case was intended to be a reference to the appellant's silence or that the jury "would naturally and necessarily" consider it to be a comment on the appellant's failure to testify. *Owen v. State*, supra. Moreover, we do not believe that this comment constituted plain error such that "when examined in the context of the entire case, [this error] is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986).

XVII

The appellant argues that all of the physical evidence which was seized from him by the Ohio police, as well as the statement taken when he was in custody, should have been suppressed because, he argues, this evidence was the fruit of an illegal arrest. The record indicates that an Ohio State Trooper testified at trial that, in the early morning of January 3, 1985, he drove into a rest area, where he observed a parked vehicle, which he noticed because the trunk lock had been punched out. The trooper checked the vehicle's tag number and determined that the vehicle had been reported as stolen, according to a NCIC report. The trooper intended *1011 to wait for other officers to arrive; however, the vehicle's back-up lights came on and the car began to back out of the parking slot. The trooper testified that he then immediately approached the vehicle with his weapon pointed at the appellant, and instructed the appellant to put his hands up. The trooper told the appellant why he was being stopped, and the appellant hesitantly followed the trooper's instructions. The trooper testified that the appellant stated that the vehicle he was in belonged to his uncle and that his uncle had been accompanying him in another vehicle, which had been parked next to him. He told the trooper that his name was Rufus Williams and that he was born on July 7, 1958. When asked how old he was the appellant stated that he was 23 years old; the trooper stated that the dates did not add up properly. The trooper asked for further identification. The appellant stated that he had none and the trooper asked if he carried a wallet. The appellant presented his wallet, and the trooper found a social security card belonging to Anthony G. Crawford, whom the appellant and his wife had visited in Tuscaloosa. The appellant then stated, "I lied to you; that's me. I am not Rufus Williams." The trooper testified that thereafter he performed an administrative inventory search of the vehicle, pursuant to the standard procedure of the Ohio Highway Patrol and, that upon entering the vehicle, he immediately observed a .38 caliber Smith & Wesson handgun underneath the arm-rest. He further found a box of .38 special cartridges and he also found bullets on the appellant's person. The appellant stated that the gun belonged to his uncle.

The basis for the appellant's objection to the arrest is the trooper's report wherein it states that, he "got an NCIC hit on the car, also says he then arrested the defendant. And he then verified that the car was stolen."

[35] [36] The appellant's arrest was proper as the trooper had sufficient probable cause to conduct a warrantless arrest. Although the State seems to argue that the

appellant was merely being detained and questioned under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it is clear that, when the trooper approached with a drawn gun, which he pointed at the appellant, telling him to raise his hands, the appellant was under arrest. See e.g. *Jordan v. State*, 549 So.2d 161 (Ala.Cr.App.1989). The trooper had sufficient probable cause based on his observation that the "trunk lock was punched," that is, that the trunk lock had been removed, that the vehicle had an Alabama license plate and was present at approximately 2:00 a.m. at a rest area in Ohio and that the file check of the vehicle showed that it was entered into NCIC as stolen. See e.g. *Bryant v. City of Gadsden*, 574 So.2d 919, 920–21 (Ala.Cr.App.1990) (an officer may rely upon a police radio broadcast to stop and arrest a suspect where the officer also had " 'a particularized and objective basis for suspecting the [defendant] of criminal activity.' " *Id.*, quoting *Ex parte Betterton*, 527 So.2d 747, 749 (Ala.1988)). Therefore, because the appellant's arrest was proper, the evidence seized from the vehicle was taken incident to a lawful arrest, *Manning v. State*, 568 So.2d 327 (Ala.Cr.App.1990), and subsequent inventory search, and his confession was not to be excluded, because it was not the fruit of an illegal arrest. *Williams v. State*, 565 So.2d 1233 (Ala.Cr.App.1990).

XVIII

[37] The appellant argues that John Stephens's identification of him should have been suppressed because it was induced by a suggestive lineup. The appellant bases his argument on the fact that John Stephens, a State's witness, picked the appellant out of a photographic array, wherein the appellant states that he was the only suspect who was displayed against a red background and the only suspect who held a plaque under his chin that said "Jefferson County Jail." The record indicates that the appellant's picture was framed during the array, so that only part of the wording, if any, was visible when Stephens viewed it. The record indicates further that the background of the photograph was red, because the photograph was taken at the Jefferson County jail. Furthermore, the record indicates that all of the pictures were distinct in some way, in that some of them had numbers on them, and some of them had height marks behind the individual. The State presented evidence *1012 that no suggestions were made by the police to Stephens as to making his identification.

"It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. [377], at 384, 88 S.Ct. 967 [at 971], 19 L.Ed.2d 1247 [1968]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process.... Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972).

Even if the photographic array could have been said to be unduly suggestive, the in-court identification by Stephens was clearly independently reliable. " '[W]hether eyewitness identification evidence which ensues from a pre-trial identification procedure is constitutionally infirm requires a two-step inquiry. First, it must be determined whether the pre-trial identification procedures were unduly suggestive.... If so, then the suggestiveness of the identification procedures must be balanced against factors indicating that the in-court identification was independently reliable.' *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir.1982)." *Hull v. State*, 581 So.2d 1202 (Ala.Cr.App.1990). "In *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) the United States Supreme Court set out certain factors to be considered in evaluating the reliability of an identification. These factors, as reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977), include 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.' " *Hull v. State*, supra. Each case is to be decided pursuant to a totality of the circumstances review. *Manson v. Brathwaite*, 432 U.S. at 110, 97 S.Ct. at 2251.

In the present case, the record indicates that the witness, John Stephens, lived in the same apartment complex as Cynthia Love and that he spoke to the appellant on two occasions while he was staying at the apartment. He first saw the appellant as he was carrying belongings into the apartment of Cynthia Love. The witness testified that he asked the appellant if he knew Cynthia Love, and that the appellant responded that he did and commended the witness for looking out for her. The witness again spoke to the appellant for a more extended period of time, after the police began investigating the crime. The witness testified that he observed the appellant with another man in a vehicle. He called the appellant over to his apartment and the appellant responded. He informed the appellant that the police had been looking for both the appellant and his wife in connection with the investigation of the offense. The appellant responded that he was concerned for his wife's welfare, with such a criminal on the loose. The witness then attempted to get some beer from the appellant; however, the appellant indicated that he had none. The witness also testified that he observed the appellant, prior to the latter conversation, fumbling with keys and apparently attempting to enter or lock Cynthia Love's apartment. The witness testified that this occurred possibly on the night of the offense. The witness was very specific and accurate in his descriptions of the appellant. It is further evident that the witness identified the appellant with a high level of certainty.

Based on the above, we find that the witness's identification of the appellant was reliable.

XIX

[38] The appellant argues that the identification of him made by witnesses Howard *1013 Marsh, Ronnie Thomas, and Steven McDaniel should have been suppressed because he was denied his right to have retained counsel present when these witnesses identified him in a lineup. The record indicates that these three witnesses all saw the perpetrator of the offense in Austin's food store on the night in question. Thereafter, on February 21, 1985,[3] a preindictment lineup, which included the appellant, took place wherein all three witnesses positively identified him as the man that they had seen in Austin's on the night of the murder. The record indicates that the appellant's court-appointed attorney was present at the lineup. However, at the suppression hearing, the appellant argued that he had retained another attorney to work on his case in addition to his appointed attorney and that he had requested the presence of this attorney at the lineup, but that his request was refused.

[39] However, "[a] defendant does not have a constitutional right to have counsel present at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *Franklin v. State*, 424 So.2d 1353 (Ala.Crim.App.1982), *cert. denied*, 424 So.2d 1353 (Ala.1983); *Tankersley v. State*, 448 So.2d 486 (Ala.Crim.App.1984); *Fisher v. State*, 439 So.2d 176 (Ala.Crim.App.), *cert. denied*, 439 So.2d 176 (Ala.1983)." *Johnson v. State*, 526 So.2d 34, 38 (Ala.Cr.App.1987). See also *Hollingquest v. State*, 552 So.2d 1078 (Ala.Cr.App.1989). Moreover, the appellant in fact had counsel present. All three witnesses, furthermore, stated that they were absolutely certain that the appellant was the man that they had seen. The appellant argues that, because two of the witnesses had previously tentatively identified Jerry Porter as the man whom they had seen, their identifications were unreliable. However, the record is clear that these two witnesses' identifications of Porter were in fact tentative, and that they stated that Porter simply looked like the man whom they had seen. Therefore, the trial court properly overruled the appellant's motion to suppress the identification of him made by these three witnesses.

XX

[40] In accordance with § 13A–5–53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error which adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The trial court properly found the existence of three aggravating circumstances: that the appellant had previously been convicted of another felony involving the use or threat of violence to the person, § 13A–5–49(2); that the crime was committed during a robbery and a rape in the first degree, § 13A–5–49(4); and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A–5–

49(8). The trial court found the existence of no statutory or nonstatutory mitigating circumstances.

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. For murder during robbery, see *Kuenzel v. State*, supra; *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991); *Stephens v. State*, 580 So.2d 11 (Ala.Cr.App.1990), affirmed, 580 So.2d 26 (Ala.1991); *Tarver v. State*, 553 So.2d 631 (Ala.Cr.App.1989), affirmed, 553 So.2d 633 (Ala.1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 966 (1990). For murder during rape in the first degree, see *Freeman v. State*, 555 So.2d 196 (Ala.Cr.App.1988), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990); *Bradley v. State*, 494 So.2d 750 (Ala.Cr.App.1985), affirmed, 494 So.2d 772 (Ala.1986), cert. denied, 480 U.S. 923, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987); *Thompson v. State*, 542 So.2d 1286 (Ala.Cr.App.1988), affirmed, *1014 542 So.2d 1300 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).

Because the appellant's conviction and sentence of death are proper, the judgment of the circuit court is affirmed.

AFFIRMED.

PATTERSON, P.J., and TYSON, McMILLAN, JJ., concur.

BOWEN, J., dissents with opinion, TAYLOR, J., joins in dissent.

BOWEN, Judge, dissenting.

I dissent from Part XVI of the opinion of the majority. The appellant here, like the accused in *Windsor v. State*, 593 So.2d 87 (Ala.Cr.App.1991), was apprehended after the commission of the capital offense with the murder weapon in his possession. The prosecutor here, like his counterpart in *Windsor*, reminded the jury that no explanation had been given for the accused's possession of the weapon. The argument in *Windsor* was as follows:

> "[Defense counsel] just glossed over this.... [T]hey can't explain this—they can't explain why this weapon was in the defendant's pocket when he was arrested. Can you offer me another reasonable hypothesis as to how that weapon got there?"

The argument here was:

> "[N]either of the defense attorneys have talked about.... that gun in that car right beside the man underneath the arm rest ... and they did not talk about the bullet in his pocket.... Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, *and you have not heard an explanation;* the evidence doesn't show you any other explanation for it."

A " 'statement by a prosecuting attorney to the effect that the evidence for the state is uncontradicted or undenied is not a comment on the defendant's failure to testify unless the defendant himself is the only one who can contradict or deny the evidence.' *Williams* [*v. State*], 461 So.2d [834] at 843, [(Ala.Cr.App.1983), reversed as to result, *Ex parte Williams*, 461 So.2d 852 (Ala.1984)]." *Stain v. State*, 494 So.2d 816, 817 (Ala.Cr.App.1986).

Like the accused in *Windsor*, the appellant here was the only one who could have explained his possession of the murder weapon. Therefore, the argument here, like the argument in *Windsor*, constituted an indirect comment on the defendant's failure to testify because the prosecuting attorney "by an indirect reference ... virtually identif[ied] the defendant as the person who did not take the stand." *Ex parte Williams*, 461 So.2d at 854.

This court reversed the conviction in *Windsor*, yet the majority affirms here. It justifies the different results in these two cases, decided just four months apart, by noting that in *Windsor*, (1) the prosecutor "pointed" to the accused when he made the comment, and (2) the defense objected to the comment. Here there was no pointing and

no objection. Neither the lack of "pointing" nor the lack of an objection is sufficient to distinguish this case from others, including *Windsor*, which have been reversed for indirect prosecutorial comments on the accused's failure to testify.

The majority makes too much of the "pointing" in *Windsor*. That physical gesture was superfluous because the defendant there, just like the appellant here, was the only one who could have been expected to explain his possession of the murder weapon. Under the facts of *Windsor* (which, for present purposes, are identical here), the prosecutor's *words* "close[ly] identifi [ed] ... the defendant as the person who did not become a witness." *Ex parte Wilson*, 571 So.2d 1251, 1261 (Ala.1990). The accompanying gesture added little or nothing to the prosecutor's verbal invitation to hold the accused responsible for failing to refute the State's evidence.

It is true that in both *Ex parte Wilson* and *Windsor v. State*, cited in the majority opinion, there were defense objections to the alleged comments on failure to testify. However, both *Wilson* and *Windsor* relied on *Ex parte Williams*, supra, a "plain error" case in which there was no objection to the prohibited "1015 comment. See *Williams v. State*, 461 So.2d at 843.

Because we found a virtually identical prosecutorial comment to be error in *Windsor*, there is no question that *this* comment was error. " 'Error' is 'plain error' ... when it 'has or probably has adversely affected the substantial rights of the [defendant],' Rule 39(k) [and Rule 45A], A.R.App.P., and plain error is to be acted upon 'in the same manner as if the defendant's counsel had preserved and raised [the] error for appellate review.' *Johnson v. State*, 507 So.2d 1351, 1356 (Ala.1986)." *Ex parte White*, 587 So.2d 1236 (Ala.1991). The error here was "plain" because it affected the rights of this appellant in the same way as the error affected the accused, under very similar circumstances, in *Windsor*.

I dissent because I believe that if *Windsor* were correctly decided and should have been reversed, then this conviction should also be reversed.

All Citations

640 So.2d 982

Footnotes

1 In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

2 There was testimony that, after the victim was found, she stated repeatedly that she did everything that the "son of a bitch" wanted, but that he still shot her. Her statements made at the hospital similarly only indicated one perpetrator.

3 The appellant was not indicted until May 3, 1985.

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RECORD AND BRIEFS

No. 16-5294

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 15 2016
OFFICE OF THE CLERK

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
MARK LOUDON-BROWN
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
mloudonbrown@schr.org

July 15, 2016

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CAPITAL CASE

QUESTIONS PRESENTED

The defendant's mitigation in this Alabama death penalty case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. Thus, as the dissent below noted, "McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts."[1]

This meaningless expert assistance violated McWilliams's rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant's mental health is a significant factor at trial, the State must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." However, there is a division among the circuits with regard to this holding, which affects the type of expert assistance indigent defendants receive nationwide, in both capital and non-capital trials. Most circuits have held that an independent defense expert is required by *Ake*, but a minority of circuits, including the court below, have found that *Ake* is satisfied by an expert who reports to both sides and the court.

The questions presented are:

(1) When this Court held in *Ake* that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," did it clearly establish that the expert should be independent of the prosecution?

(2) Did the Alabama courts unreasonably apply *Ake* in finding that McWilliams's rights were satisfied when the only mental health expert he was provided distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records?

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[1] *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 716 (11th Cir. 2015) (Wilson, J., dissenting).

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PETITION FOR WRIT OF CERTIORARI

Petitioner James McWilliams respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing en banc is attached as Appendix A. The per curiam decision of the Eleventh Circuit affirming the district court's denial of McWilliams's petition for a writ of habeas corpus, along with the concurring and dissenting opinions, is reported at *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015), and attached as Appendix B. The opinion of the Alabama Supreme Court affirming McWilliams's conviction is reported at *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), and attached as Appendix C. The opinion of the Alabama Court of Criminal Appeals affirming McWilliams's conviction is reported at *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), and attached as Appendix D.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of McWilliams's petition for a writ of habeas corpus in an opinion dated December 16, 2015, and subsequently denied McWilliams's petition for rehearing en banc via an order dated February 16, 2016. On March 24, 2016, Justice Thomas extended the time within which to file this petition for writ of

certiorari to and including July 15, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In elementary school, James McWilliams sustained a head injury when a group of boys attacked him and beat him over the head with a glass bottle. (Vol. 7 at 1304-05; Vol. 8 at 1632.)[2] He lost consciousness, he bled from the ear and scalp, and glass had to be removed from inside of his head. (Vol. 8 at 1632.) After that injury, McWilliams's behavior changed; he became a disruptive child. (Vol. 7 at 1305-06.) He required follow-up treatment both in and out of the hospital, had difficulties with his vision in his left eye, and lost some motor functioning in his left arm and hand following the injury. (Vol. 7 at 1305-06; Vol. 8 at 1632.) Previously an aspiring violinist, McWilliams could no longer play the instrument. (Vol. 8 at 1632.) By the time he was a teenager, the doctor treating him at his local hospital recommended that he begin seeing a psychiatrist due to his severe headaches and worsening behavior following the head injury, but his mother never took him for this recommended treatment. (Vol. 7 at 1305-06.)

A few years later, McWilliams suffered another head injury, lost consciousness again, and suffered a broken jaw. (Vol. 8 at 1632.) Following that, he suffered a third significant head injury when his head struck the front windshield during a car accident. (Vol. 7 at 1306-07; Vol. 8 at 1632.) When he tried to go home after leaving the hospital, he collapsed, but he never received further follow-up medical treatment. (Vol. 7 at 1306-07.)

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[2] Citations to the state court record are to the volume and page number as certified to the Alabama Court of Criminal Appeals and as indicated in Appellant's Record Excerpts, which was filed in the Eleventh Circuit below.

Following these injuries, McWilliams's behavior changed dramatically. He suffered from significant memory loss. McWilliams sometimes would act out violently at home, but then could not recall doing so until his mother told him what had happened. (Vol. 7 at 1310-11.) Prior to dropping out of high school, he was referred to a psychiatrist after a self-inflicted overdose of Librium, a benzodiazepine that he was prescribed, but McWilliams never saw one. (Vol. 7 at 1308, 1323-24.) When a family doctor recommended that McWilliams be admitted to the psychiatric unit of a hospital for inpatient treatment, his mother again disregarded the recommendation. (Vol. 7 at 1308-10.)

On August 26, 1986, McWilliams was convicted of the robbery, rape, and murder of a convenience store clerk in Tuscaloosa, Alabama. (Vol. 7 at 1292.) The next day, the court conducted a sentencing hearing before a jury that lasted from 9:00 a.m. until 2:25 p.m. (Vol. 7 at 1295, 1399.) In mitigation, the defense presented only the lay testimony of McWilliams and his mother. (Vol. 7 at 1303-36.) Although McWilliams's mother explained her son's head trauma, the ways in which his behavior changed after the trauma, the subsequent recommendations for psychiatric treatment, and her failures to follow up on those recommendations, she was unable to offer a professional opinion as to his mental health. (Vol. 7 at 1304-06.) When pressed on cross-examination, all she could say was, "I am no expert. I don't know whether my son is crazy or not. All I know, that my son do [*sic*] need help." (Vol. 7 at 1317.)

In rebuttal, the State presented the expert testimony of two state psychiatrists from the Taylor Hardin Secure Medical Facility who had evaluated McWilliams and opined that McWilliams was a malingerer who did not have any mental health disorders at all. (Vol. 7 at 1336-69.) The jury recommended that McWilliams be sentenced to death by a non-unanimous vote of ten to two. (Vol. 7 at 1400.)

Following the jury's sentencing recommendation, the trial court noted that evidence had been presented that McWilliams suffered severe blows to the head and exhibited behavior problems years before the offense. (Vol. 8 at 1612, 1615.) On September 3, 1986, the court granted defense counsel's motion for a mental health expert to perform neurological and neuropsychological examinations of McWilliams and to assist the defense at the judicial sentencing hearing, which was scheduled for October 9, 1986. (Vol. 8 at 1612.)

On October 7, 1986, Dr. John Goff, a clinical neuropsychologist employed by the state of Alabama at the Taylor Hardin Secure Medical Facility, issued a neuropsychological evaluation diagnosing McWilliams with Organic Personality Syndrome. (Vol. 8 at 1636.) Dr. Goff was a colleague of the two experts who had testified before the jury for the State against McWilliams (Vol. 7 at 1337, 1360), yet he was the expert appointed by the trial court supposedly to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Dr. Goff's report was distributed to McWilliams's counsel a mere two days before sentencing. It

simultaneously was distributed to the prosecuting attorney and the judge to use as they saw fit.

Dr. Goff traced McWilliams's mental health diagnosis to "organic brain dysfunction . . . localized to the right cerebral hemisphere." (Vol. 8 at 1635.) "The difficulties he has, with his left hand in particular, are suggestive of a right hemisphere lesion." (Vol. 8 at 1635.) In Dr. Goff's opinion, "symptoms includ[ing] left hand weakness, poor motor coordination of the left hand, sensory deficits . . . and very poor visual search skills" were indicative of "cortical dysfunction attributable to right cerebral hemisphere dysfunction." (Vol. 8 at 1636.) Dr. Goff's report, therefore, linked the head injuries McWilliams suffered as a child to his mental health disorders—hence the diagnosis of Organic Personality Syndrome.[3] Because the results were reported so shortly before the judicial sentencing hearing, however, defense counsel had no opportunity to discuss these findings with Dr. Goff or to educate themselves as to what the diagnosis meant for purposes of a mitigation case.

Dr. Goff also administered a Minnesota Multiphasic Personality Inventory (MMPI) test that revealed a "cry-for-help" assessment, as opposed to a "fake-bad" assessment, which the State doctors had reported as support for their opinion that McWilliams was a malingerer. (Vol. 8 at 1635.) There was no further explanation

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[3] Organic Personality Syndrome—now referred to within the medical community as "Personality Change Due to Another Medical Condition"—is a disorder characterized by a "persistent personality disturbance that represents a change from the individual's previous characteristic personality pattern," which is "the direct pathophysiological consequence of another medical condition." American Psychiatric Association, *Diagnostic and statistical manual of mental health disorders: DSM-5* 682 (5th ed. 2013). This condition causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.*

in the report of what a "cry-for-help" assessment meant or how the defense might be able to use it to advocate for a sentence other than death.

As a result, McWilliams's counsel arrived to court on the morning of the judicial sentencing hearing with a report diagnosing McWilliams with a significant mental health impairment, traceable to brain injuries suffered as a child and teen, and containing findings that contradicted the prior findings by the State's doctors. Moreover, voluminous medical and psychological records that counsel had been seeking for over six weeks[4] from Holman Prison did not arrive until the morning of sentencing. (Vol. 8 at 1406, 1618.) Defense counsel had subpoenaed the records after learning that McWilliams was being administered Mellaril (an antipsychotic drug), Librium (a benzodiazepine), Restoril (a benzodiazepine), and a version of Thorazine (an antipsychotic drug) while incarcerated. (Vol. 7 at 1326-27.) McWilliams was also seeing a psychologist three times per week and a psychiatrist approximately once per month, and had received mental health treatment at the Taylor Hardin Secure Medical Facility on various occasions during his incarceration. (Vol. 7 at 1327.)

Allowed virtually no time prior to sentencing to review Dr. Goff's report, the mental health diagnosis, and the medical and psychological records, defense counsel repeatedly told the judge that McWilliams was being deprived meaningful expert assistance because he lacked the chance to review the report and underlying test

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[4] Counsel subpoenaed the prison records in August of 1986. Having not received them, counsel filed a motion in September for the Department of Corrections to show cause as to why it should not be held in contempt for failing to comply. Nevertheless, the records did not arrive until the morning of sentencing on October 9, 1986. (Vol. 8 at 1405-06, 1618.)

results, to discuss the report and psychological records with Dr. Goff, and to utilize Dr. Goff's assistance to evaluate, prepare, and present McWilliams's sentencing evidence and arguments. (Vol. 8 at 1404, 1406, 1408-11, 1423-28.) Thus, counsel argued:

> [B]ased on the medications prescribed and the brief notes in the records . . . someone has determined some psychotic behavior on the part of Mr. McWilliams. But we are unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing . . . Mr. McWilliams is being punished instead of the people who have not provided the material.

(Vol. 8 at 1409-10.)

The morning of the judicial sentencing amounted to nothing more than argument about the denial of meaningful expert assistance, followed by the testimony of a probation and parole officer who prepared a pre-sentence report for the prosecution and the court. (Vol. 8 at 1404-22.) Dr. Goff did not testify and the defense presented no witnesses. (Vol. 8 at 1404-22.) The trial court then recessed until 2:00 p.m. for sentencing. (Vol. 8 at 1422.)

Unable to effectively represent McWilliams due to a lack of meaningful access to an expert—with whom defense counsel had not even had the opportunity to speak—counsel filed a motion to withdraw over the lunch break. "Counsel feels the arbitrary position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." (Vol. 8 at 1644.) The motion to withdraw was denied. (Vol. 8 at 1644.)

That afternoon, after again refusing to grant the defense's request for time to consult with Dr. Goff, the trial judge asked defense counsel whether he wished to make a closing argument to rebut the closing argument the prosecutor had just made. (Vol. 8 at 1426.) Defense counsel's argument began as follows:

> Your Honor, I would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce any mitigating circumstances.

(Vol. 8 at 1426-27.) One paragraph worth of transcript later, counsel's closing argument as to why McWilliams's life should be spared ended as follows:

> In my opinion, the Court has foreclosed[,] by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms. And at that point, I have nothing else to say.

(Vol. 8 at 1428.) The judge then sentenced McWilliams to death. (Vol. 8 at 1431-32.)

McWilliams subsequently challenged the trial court's *Ake* ruling on direct appeal.[5] The Court of Criminal Appeals held that the requirements of *Ake* were met simply upon provision of a "competent psychiatrist." *McWilliams v. State*, 640 So. 2d 982, 991 (Ala. Crim. App. 1991). The Supreme Court of Alabama affirmed. *Ex parte McWilliams*, 640 So.2d 1015 (Ala. 1993). Following state collateral proceedings,[6] McWilliams filed a habeas petition in federal court, which was denied.

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[5] *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part and remanded in part, Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand, McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *aff'd following remand, McWilliams v. State*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd, Ex parte McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied, McWilliams v. Alabama*, 516 U.S. 1053 (1996).

[6] *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004); *Ex parte McWilliams*, No. 1031428 (Ala. Sept. 24, 2004).

On December 16, 2015, the United States Court of Appeals for the Eleventh Circuit, in a per curiam decision by a vote of two to one, affirmed the denial of the petition. *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015). In dissent, Judge Wilson wrote that McWilliams was denied his *Ake* right to "meaningful access" to expert mental health services:

> Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process.

Id. at 716 (Wilson, J., dissenting). Judge Wilson also made clear that Dr. Goff could not possibly provide the kind of expert assistance contemplated by *Ake* because he was free to "cross the aisle and disclose to the State the future cross-examination of defense counsel." *Id.* at 715 (Wilson, J., dissenting) (internal quotations omitted). The Eleventh Circuit denied McWilliams's petition for rehearing via an order dated February 16, 2016.

REASONS FOR GRANTING THE WRIT

Ake v. Oklahoma established that an indigent defendant has a constitutional right to an independent expert to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. A minority of the federal courts of appeals, however, including the Eleventh Circuit below, have misunderstood this

mandate and held that the provision of a non-independent expert who is equally accessible to both the prosecution and defense is sufficient to satisfy *Ake*.

The Court should resolve the split created by the minority of circuits that have misread *Ake*'s holding to ensure that indigent defendants nationwide, in capital and non-capital trials alike, receive the expert assistance *Ake* guaranteed. This case provides an excellent vehicle through which to resolve this split because McWilliams's case for mitigation at sentencing depended entirely on his mental health history. Yet McWilliams was appointed a non-independent expert so late in the proceedings that defense counsel could not meaningfully consult with him or utilize his assistance, and McWilliams was thereby deprived of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

I. THE COURT SHOULD RESOLVE THE SPLIT AMONG THE FEDERAL CIRCUIT COURTS AS TO WHAT *AKE V. OKLAHOMA* ESTABLISHED.

This Court held, in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), that when a defendant demonstrates that his mental health is a significant factor at trial, he is entitled to meaningful access to a psychiatrist "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." While *Ake* was clear that an indigent defendant does not have the right to an expert of his choosing, *id.* at 83, it was equally clear that the expert assistance must be meaningful, *id.* at 77, 82. This Court reasoned that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, *to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses*, the

risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82 (emphasis added).

Nevertheless, in arriving at its decision below, the Eleventh Circuit recognized that there is an unresolved split among the federal circuits as to what *Ake* held. "In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake* . . . Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*." *McWilliams*, 634 F. App'x at 705-06 (citations omitted). The Eleventh Circuit further observed that the Supreme Court "has thus far declined to resolve this disagreement among the circuits." *Id.* at 706. With its decision, the Eleventh Circuit joined the minority of circuits that have misunderstood that *Ake* requires an independent expert, which has perpetuated a split with the circuits that have properly applied *Ake*.

The majority of circuits have correctly interpreted *Ake* to require expert assistance that is independent of the prosecution. The Sixth Circuit has held that "an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by court appointment of a 'neutral' psychiatrist – i.e., one whose report is available to both the defense and the prosecution." *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003); *accord Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006). The Sixth Circuit noted that the Eighth, Ninth, Tenth, and D.C. Circuits are among the majority of circuits that have held that a neutral, i.e. shared, court psychiatrist does not satisfy due process. *Powell*, 332 F.3d at 391. The Third, Fourth, and Ninth Circuits have held the same.

See Szuchon v. Lehman, 273 F.3d 299, 317-18 (3d Cir. 2001) (noting that *Ake* is not satisfied by the appointment of a non-independent expert alone); *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir. 2000) (interpreting *Ake* to require "two views on a mental health issue"); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("evaluation by a 'neutral' court psychiatrist does not satisfy due process").[7]

In 1985, the same year that *Ake* was decided, the Tenth Circuit held that *Ake* cannot be satisfied by the appointment of a non-independent expert, for "[t]he essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985). Thus, when a defendant seeks "the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination," he is "deprived of the fair trial due process demands" if he does not receive that assistance. *Id.* at 929.

In practice, then, indigent defendants in almost every circuit are afforded an independent expert under *Ake*, which is consistent with the plain language of the *Ake* opinion itself. The Fifth Circuit, however, has misinterpreted *Ake*, and the Eleventh Circuit's per curiam decision relied upon this misunderstanding in

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[7] Even the Eleventh Circuit has, in the past, applied the clear mandate of *Ake*. Quoting the Ninth Circuit, "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate . . . ." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (quoting *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990)). The court there emphasized that "*Ake* holds that psychiatric assistance must be made available for the *defense*." *Id.* (emphasis in original). Thus, an expert who provided information to both the prosecution and the defense was insufficient to satisfy the due process demands of *Ake*. *Id.*

denying McWilliams relief. As recently as 2009, the Fifth Circuit held—in terms starkly contradictory to *Ake* itself—that "*Ake* does not clearly provide a constitutional right to an 'independent' psychiatrist." *Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009). Following suit, the Eleventh Circuit below joined the minority of circuits that believe a shared expert satisfies *Ake*.

Just because a minority of circuits have misinterpreted the holding of *Ake*, however, does not indicate that *Ake* failed to clearly establish an indigent defendant's right to an independent mental health expert. Indeed, following *Ake* this Court noted that under *Ake*, "due process requires that the State provide the defendant with the assistance of an *independent* psychiatrist." *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (citing *Ake*, 470 U.S. at 83-84) (emphasis added). The circuits that have read *Ake* to hold anything less are simply wrong.

Accordingly, the Ninth Circuit has correctly held that it was contrary to clearly established Supreme Court precedent to find that a court-appointed shared mental health expert, without more, satisfied *Ake*. *Jones v. Ryan*, 583 F.3d 626, 638 (9th Cir. 2009), *vacated and remanded on other grounds*, 563 U.S. 932 (2011).[8] Absent confidentiality, an expert has "no obligation to protect or further the interests of the defendant," and cannot "sufficiently assist in the preparation, evaluation, and presentation of the defense." *Id.* at 639 (citations and internal

[8] When this Court grants a petition for writ of certiorari, vacates the lower court judgment, and remands the case for further proceedings, that "does not negate the precedential authority or persuasiveness of the holding and reasoning" of the lower court's opinion, as such orders "are not reversals and do not indicate that the lower court's decision was erroneous." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 375 n.3 (7th Cir. 2015); *accord Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013).

quotations omitted). Thus, "[a]s the Supreme Court explained in *Ake*, without the assistance of a defense psychologist who can not only testify, but prepare counsel for cross-examination of the State's witnesses, the risk of inaccurately resolving the mental health issues presented grows impermissibly high." *Id.* at 638. *See also Detrich v. Ryan*, 619 F.3d 1038, 1054 (9th Cir. 2010), *vacated and remanded on other grounds*, 563 U.S. 984 (2011) (observing once again that a state court unreasonably applies *Ake* if it finds that the appointment of a shared court-appointed psychologist is sufficient to satisfy due process).

Likewise, the Seventh Circuit observed that under *Ake*, "the defendant is *clearly* entitled to his *own* expert and examination to help prepare his defense [where] the state has signaled that it may use psychological evidence against the defendant." *Schultz v. Page*, 313 F.3d 1010, 1016 (7th Cir. 2002) (holding that the state court's rejection of an *Ake* claim was contrary to and an unreasonable application of clearly established law) (emphasis added).

Justice Rehnquist, in his dissent in *Ake* itself, argued that if the Court grants a defendant the right to a state-appointed expert, *all* that should be required is "a psychiatrist who acts *independently of the prosecutor's office*." *Ake*, 470 U.S. at 92 (Rehnquist, J., dissenting) (emphasis added). In other words, Justice Rehnquist read the majority opinion in *Ake* to require something even *beyond* independent expert assistance: "a defense consultant." *Id.* at 87 (Rehnquist, J., dissenting). He would have scaled the majority opinion back to require only an independent expert,

something the Fifth and Eleventh Circuits erroneously believe was not even required by *Ake*.

Yet McWilliams was deprived of even that baseline independent expert assistance. He received neither an independent expert nor a defense consultant. Rather, McWilliams "received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting). He received an expert who was simultaneously and equally serving the State. Accordingly, this case presents an ideal vehicle for this Court to resolve the circuit split with regard to what *Ake* held.

"[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 U.S. at 76. Nor is it meaningful where, as here, the expert's report and voluminous medical and psychological records were provided to the defense so close to sentencing that counsel lacked the opportunity to assess those critical documents or consult with the expert about his findings.

Ake was clear. It entitled McWilliams to an independent expert. This Court should grant certiorari in this case to resolve the split and ensure that all trials, capital and non-capital, are conducted in accordance with the due process *Ake* required.

II. EVEN UNDER THE MOST RESTRICTIVE READING OF *AKE*, MCWILLIAMS WAS DENIED MEANINGFUL ACCESS TO EXPERT ASSISTANCE.

Even assuming arguendo that *Ake* did not clearly establish an indigent defendant's right to an independent expert, McWilliams was denied meaningful access to an expert. It is undisputed that McWilliams made the showing required that entitled him to meaningful mental health expert assistance at sentencing. Instead, he was given an expert who simultaneously was free to and did share his thoughts, findings, and opinions with the State for its use. Moreover, defense counsel learned the expert's findings just two days before sentencing, was unable to confer with the expert regarding his diagnoses and the support for his conclusions, and did not receive substantial, long overdue, medical and psychiatric records until the very morning of sentencing.

For expert assistance to be meaningful, the defense expert must be able to assist the defense in preparing for his direct examination, anticipating cross-examination, crafting an effective cross-examination of any State experts, and articulating the probative value of the expert's findings during argument. Only then can courts be confident that the adversary system is serving its function and that "the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors' and would therefore be competent to 'uncover, recognize, and take due account of . . . shortcomings'" in the expert opinions. *Ake*, 470 U.S. at 84 (citation omitted). McWilliams could avail himself of none of this assistance. Whereas an affluent

defendant is free to hire experts bound by privilege to further his defense, an indigent defendant like McWilliams who receives only a non-independent expert is deprived the assistance required to meaningfully contest the State's experts.

McWilliams's trial counsel repeatedly argued that he was being denied meaningful expert assistance, and counsel felt he was rendered so ineffective that he was compelled to request to withdraw from the case. As Judge Wilson observed:

> McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process.

McWilliams, 634 F. App'x at 716 (Wilson, J., dissenting). McWilliams never had the chance to discuss the report or underlying records with Dr. Goff, let alone utilize him to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

The expert assistance McWilliams received in this case lacked meaning. Trial counsel captured the harm to McWilliams from being deprived meaningful assistance when, during his closing argument at the judicial sentencing hearing, he observed, "the Court has foreclosed . . . the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms." (Vol. 8 at 1428.) "And at that point, [he had] nothing else to say." (Vol. 8 at 1428.) That is not meaningful expert assistance. In finding otherwise, the Alabama courts unreasonably applied the clear dictates of *Ake* to the facts of this case.

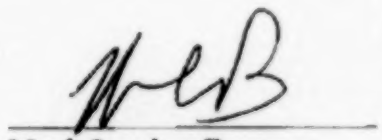
CONCLUSION

For the foregoing reasons, this Court should grant certiorari to resolve the split among the circuits as to what was established by *Ake v. Oklahoma* and to reverse the denial of habeas relief.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on July 15, 2016, I served a copy of the foregoing via first-class mail, postage prepaid, and via email, upon counsel for the Respondent:

Henry M. Johnson
Assistant Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel. 334-353-9095
hjohnson@ago.state.al.us



Mark Loudon-Brown

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No. 16-5294
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, Commissioner of the Alabama Department of Corrections, *et. al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LUTHER STRANGE
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General

Henry M. Johnson
Assistant Alabama Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637
hjohnson@ago.state.al.us

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW
(Rephrased)

Before his trial, the petitioner moved the court for an evaluation to assess his sanity at the time of the offense and his competency to stand trial and to determine whether there is evidence to support the finding of any mitigating circumstances. The trial court granted his motion and ordered that a Lunacy Commission be convened to evaluate him. The Lunacy Commission's findings and conclusions were not helpful to the petitioner.

After the jury recommended that the petitioner be sentenced to death, the petitioner's counsel did not file an application under *Ake* requesting the assistance of "one competent psychiatrist." *Ake v. Oklahoma*, 470 U.S. 68, 79, 105 S. Ct. 1087, 1094 (1985) ("[T]he obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today."). Instead, they moved the court "to issue an order requiring the State of Alabama to do complete neurological and neuropsychological testing on the Defendant ... with the results made available to the court." The petitioner received what he requested and more. The court ordered the Department of Corrections ("DOC") to conduct that testing. Dr. Paul D. Bivens, a DOC employee, performed certain tests on the petitioner, and the petitioner later was evaluated by Dr. John R. Goff, a neuropsychologist.

The petitioner's counsel were provided with Dr. Goff's report before his sentencing hearing, and they could have contacted Dr. Goff, who lived and worked in the same city where the petitioner was being tried, to ask him questions about his report and to determine whether it would be beneficial to call him at the hearing. But they decided not to contact him. On the morning of the hearing, Mr. Joel Sogol, one of the petitioner's counsel, stated the following in arguing for a continuance, "Not that I impugn Doctor Goff in any way, but I feel that, given the nature of the case, that it is necessary on my part to have someone else review these findings." Despite making that statement, Mr. Sogol proceeded to impugn not only Dr. Goff but also the three members of the Lunacy Commission. In response, the court twice offered his counsel the opportunity to make a formal motion for someone to be appointed to review Dr. Goff's findings, but they rejected that invitation. Nevertheless, the court considered the information contained in the Lunacy Commission's report, Dr. Bivens's report, and Dr. Goff's report in sentencing the petitioner.

The questions presented are:

1. Should this Court grant certiorari to announce that *Ake* is not satisfied unless a trial court provides a defendant who makes a showing that sanity at the time of the offense is an issue or a capital defendant who makes a showing that mental-health issues could form the basis of a mitigating circumstance with a partisan psychiatric expert who will report only to that defendant where the particular facts and procedural posture of McWilliams's case make this a poor vehicle for deciding that question?

2. Under the Anti-Terrorism and Effective Death Penalty Act, was it contrary to, or an unreasonable application of, this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985), for the Alabama Court of Criminal Appeals to hold that the trial court satisfied *Ake's* requirements by providing McWilliams with access to a competent psychiatric expert and where McWilliams utilized that assistance?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the courts below.

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OPINIONS BELOW

In 1984, James McWilliams murdered Patricia Vallery Reynolds during the course of a robbery in the first degree and a rape in the first degree in Tuscaloosa County, Alabama. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed McWilliams's convictions and death sentence. Pet. App. C, D. This Court denied McWilliams's petition for writ of certiorari. *McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

McWilliams subsequently filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The state circuit court entered an order denying McWilliams's petition. The Alabama Court of Criminal Appeals affirmed the circuit court's ruling. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). The Alabama Supreme Court denied McWilliams's petition for writ of certiorari. *Id.*

McWilliams next filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. District Court Judge R. David Proctor entered a memorandum opinion and final judgment denying McWilliams's habeas petition. *McWilliams v. Campbell*, No. 7:04-CV-2923-RDP-RRA, 2013 WL 1680509 (N.D. Ala. Apr. 17, 2013). The Eleventh Circuit affirmed the judgment of the district court. Pet. App. B. The Eleventh Circuit denied McWilliams's petitions for rehearing and rehearing *en banc*. Pet. App. A.

STATEMENT OF JURISDICTION

The statement of jurisdiction that is contained on pages 1-2 of McWilliams's petition for writ of certiorari is correct.

STATEMENT OF THE CASE

A. The Proceedings Below

On May 3, 1985, James McWilliams was indicted by the Grand Jury of Tuscaloosa County, Alabama on four counts of capital murder. (Vol. 8, pp. 1434-1437.)[1] The first two counts of the indictment charged McWilliams with the capital offense of murdering Patricia Vallery Reynolds during the course of a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975). *Id.* at 1434-1435. Count three of the indictment charged McWilliams with the capital offense of murdering Ms. Reynolds during the course of a rape in the first degree, in violation of section 13A-5-40(a)(3) of the Code of Alabama (1975). *Id.* at 1436. Count four of the indictment charged McWilliams with the capital offense of murdering Ms. Reynolds during the course of sodomy in the first degree, in violation of section 13A-5-40(a)(3) of the Code of Alabama (1975). *Id.* at 1436-1437. At the State's request, the trial court dismissed count

[1] This citation format, with volume and tab numbers, refers to the state court record. The state court record and the index of that record (i.e., the habeas corpus checklist) were filed in the district court on December 17, 2004. Doc. 12. On February 23, 2005, Respondents filed a supplement to the habeas corpus checklist that identifies two additional briefs that were filed during McWilliams's direct appeal proceeding. Doc. 20.

four of the indictment. *Id.* at 1602. The Honorable Jerome B. Baird presided over McWilliams's trial.

On August 27, 1986, a Tuscaloosa county jury found McWilliams guilty of the capital murder of Ms. Reynolds under counts one, two, and three of the indictment. *Id.* at 1595, 1603. On August 28, 1986, the jurors, following the presentation of evidence, closing arguments, and instructions from the trial judge, recommended by a vote of ten to two that McWilliams should be sentenced to death. *Id.* at 1603. On October 16, 1986, the trial court followed the jury's recommendation and sentenced McWilliams to death. *Id.* at 1646-1653.

McWilliams's convictions and death sentence were affirmed on direct appeal. *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part and remanded in part*, 640 So. 2d 1015 (Ala. 1993), *on remand*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion on return to remand*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd*, 666 So. 2d 90 (Ala. 1995), *cert denied*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

McWilliams next filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, in the state circuit court. (Vol. 16, Tab #R-47, pp. 16-66.) McWilliams, through counsel, filed an amended Rule 32 petition, a second amended Rule 32 petition, and a revised second amended petition. (Vol. 18, Tab #R-49, pp. 466-531, Vol. 18, pp. 689-759, Vol. 18, Tab #R-

51, pp. 760-800, Vol. 19, Tab #R-51, pp. 801-830.) The circuit court held an evidentiary hearing on the claims in his amended Rule 32 petition.

The circuit court struck McWilliams's second amended petition and revised second amended petition because he improperly filed them, respectively, on the eve of the evidentiary hearing that was scheduled to be held on the claims in his amended petition and on the first day of that hearing. (Vol. 24, pp. 1754-1755.) The circuit court then entered a final order denying all relief on McWilliams's amended petition. (Vol. 41, Tab #R-80.)

The Alabama Court of Criminal Appeals affirmed the circuit court's judgment. *McWilliams v. State*, 897 So. 2d 437, 445 (Ala. Crim. App. 2004). The Alabama Supreme Court denied McWilliams's petition for writ of certiorari. (Vol. 41, Tab #R-82.)

McWilliams, through counsel, subsequently filed a petition for writ of habeas corpus. Doc. 1. The district court designated Magistrate Judge Robert R. Armstrong, Jr., to review McWilliams's claims contained therein and submit a report and recommendation regarding the disposition of his habeas petition.

On February 1, 2008, Magistrate Judge Armstrong entered his Report and Recommendation in which he recommended that McWilliams's petition for writ of habeas corpus and his request for an evidentiary hearing should be denied. Doc. 55. McWilliams filed objections to the Report and Recommendation in which he

raised specific objections to Judge Armstrong's resolution of seven claims that he raised in his habeas petition. Doc. 57 at 2-62. Before he outlined his objections to the magistrate's disposition of those claims, McWilliams stated that he "objects to the Magistrate's Report and Recommendation and refers to his earlier argument, including but not limited to," and he then listed fifteen pleadings that he filed during his habeas proceeding. *Id.* at 1-2. He then filed his "final supplemental objections" to the Report and Recommendation in which he raised additional objections to the magistrate's resolution of several claims in his petition. Doc. 63.

On August 25, 2010, the district court entered a Memorandum Opinion in which the court addressed the specific objections that McWilliams raised to the magistrate's resolution of the claims in his habeas petition and a separate Order of Dismissal in which the court dismissed McWilliams's habeas petition with prejudice and denied a certificate of appealability. Docs. 75, 76. Having rejected each of McWilliams's specific objections, the court then stated that it "overrules all of [his] objections and hereby adopts and approves the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court." *Id.* at 24.

The Eleventh Circuit granted a certificate of appealability as to the following question: "Whether the district court violated *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (*en banc*), by summarily overruling all of McWilliams's objections without specifically acknowledging those made to the magistrate

judge's report and recommendation by reference to prior pleadings and argument." On September 10, 2012, the Eleventh Circuit vacated the district court's decision and remanded McWilliams's case to the lower court with instructions to resolve all of the claims in his habeas petition, as is required by *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (*en banc*). *McWilliams v. Warden, Holman State Correctional Facility*, No. 10-14533 (unpublished order).

Pursuant to the Eleventh Circuit's remand directive, the district court entered a memorandum opinion on April 17, 2013, in which the court overruled all of McWilliams's objections to the magistrate judge's Report and Recommendation, adopted that Report in full, and denied relief on McWilliams's petition. Doc. 97. The district court denied McWilliams's Application for Certificate of Appealability on October 7, 2013. Doc. 105.

McWilliams filed an Application for Certificate of Appealability and a supporting brief in the Eleventh Circuit. The court granted him a Certificate of Appealability as to four of the issues that he raise therein. On December 16, 2015, the Eleventh Circuit affirmed the district court's judgment. Pet. App. B.

B. Facts of the Underlying Offense

In its opinion on direct appeal, the Alabama Court of Criminal Appeals summarized the facts of McWilliams's crime as follows:

> The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on

December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.

Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.

Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

The defendant was identified by eyewitnesses who placed him at the scene.

The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty.

McWilliams, 640 So. 2d at 986-987.

C. Facts and Arguments Surrounding McWilliams's *Ake* Claim

McWilliams contends that his counsel were denied the opportunity to consult with and question Dr. John R. Goff, the neuropsychologist who evaluated him before his sentencing hearing, about his findings and conclusions regarding his

mental health and that they, therefore, were prevented by the trial court from utilizing "Dr. Goff's assistance to evaluate, prepare, and present McWilliams's sentencing evidence and arguments." Pet. at 6-8. In fact, McWilliams goes so far as to accuse the trial court of "refusing to grant the defense's request for time to consult with Dr. Goff." *Id.* at 9. Nothing could be further from the truth. As will be shown below, McWilliams's counsel never requested time to consult with Dr. Goff, adamantly refused to speak with Dr. Goff, and, at the sentencing hearing that was held before the trial court, impugned and insulted Dr. Goff and the members of the Lunacy Commission who evaluated McWilliams before his trial.

McWilliams did not file a pre-trial application under *Ake* requesting the assistance of a psychiatrist. Instead, he moved the court for an evaluation to assess his sanity at the time of the offense and his competency to stand trial and to determine whether there is any evidence to support the finding of the statutory mitigating circumstances that are set forth in Section 13A-5-51(2) and (6) of the Code of Alabama (1975). (Vol. 8, pp. 1526-1527.) The trial court granted his motion and, pursuant to Section 15-16-22 of the Code of Alabama (1975), ordered that a Lunacy Commission be convened to evaluate his sanity at the time of the offense, his competency to stand trial, and the existence of any statutory mitigating circumstances. *Id.* at 1528-1530.

McWilliams was transported to the Taylor-Hardin Secure Medical Facility ("Taylor-Hardin") in Tuscaloosa, Alabama, where he was evaluated by three psychiatrists from April 2, 1986, until May 21, 1986. *Id.* at 1543-1547. According to the Lunacy Commission report, the psychiatrists agreed that McWilliams was not suffering from any mental illness at the time of the offense and that he was competent to stand trial. *Id.* Two of the psychiatrists concluded that he did not exhibit any "psychiatric symptoms" that "would provide a basis for mitigating factors at the time of the alleged crime." *Id.* at 1546. One of the psychiatrists, Dr. Kamal Nagi, found that he was "grossly exaggerating his psychological symptoms to mimic mental illness" and concluded that he was malingering. *Id.* at 1545.

After the jury reached its advisory verdict at the penalty-phase of his trial, McWilliams again failed to file an application under *Ake* requesting the assistance of a psychiatrist. Instead, he moved the trial court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant ... and to order at least that the Defendant be given an EEG, Luria, and Bender-Gestalt, *with the results made available to the court.*" *Id.* at 1615 (emphasis added). The court granted his motion, ordered DOC to perform "complete neurological and neuropsychological testing on the Defendant, including, but not limited to EEG, Luria, and Bender-Gestalt," and ordered that the results be sent to the Court Clerk's Office. *Id.* at 1612.

Dr. Paul D. Bivens, a DOC employee, administered the Bender Visual Motor Gestalt Test to McWilliams. In a letter to the trial court, Dr. Bivens stated that McWilliams's performance on that test instrument was "equivocal" and could indicate malingering, a possible organic impairment, or a possible psychological impairment. *Id.* at 1621-1622. Dr. Bivens recommended that McWilliams receive additional testing that "might well include the Luria or the Halstead-Reitan Neuropsychological Battery and/or other testing." *Id.* at 1621. Because DOC was not able to administer any other tests to McWilliams, he was transferred to Taylor-Hardin for additional testing. *Id.* at 1616-1617, 1620.

After McWilliams was re-admitted to Taylor-Hardin, Dr. John R. Goff, a clinical neuropsychologist who was then-serving as the Chief of Psychology at Bryce Hospital in Tuscaloosa, evaluated him. *Id.* at 1631-1643. Dr. Goff administered the Halstead-Reitan Neuropsychological Test Battery and several other tests to McWilliams. *Id.* at 1633. Although Dr. Goff found that McWilliams "has some genuine neuropsychological problems," he concluded that he "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems." *Id.* at 1635.

Dr. Goff's report was provided to McWilliams's counsel, the prosecution, and the trial court before the sentencing hearing. *Id.* at 1407. Again, McWilliams

specifically requested that the report be "made available to the trial court," and he never objected to the report being provided to the prosecution. *Id.* at 1615.

Given that Dr. Goff lived and worked in Tuscaloosa, the city where McWilliams was being tried, McWilliams's counsel could have contacted him to ask him questions about his report and ascertain whether he could provide any beneficial testimony at McWilliams's sentencing hearing, but they chose not to speak with him. *Id.* at 1637. Instead, on the morning of the hearing, his counsel moved for a continuance so that they, among other things, could look for a different expert to review Dr. Goff's report. *Id.* at 1408. In making that motion, Joel Sogol, one of McWilliams's counsel, stated: "Not that I impugn Doctor Goff in any way, but I feel that, given the nature of this case, that it is necessary on my part to have someone else review these findings." *Id.* at 1408. Despite making that statement, Mr. Sogol then impugned Dr. Goff and the members of the Lunacy Commission by suggesting, without any support, that they were improperly trained, by referring to them as, "supposed experts in their areas," and by opining that he had "very little confidence in their findings." *Id.* at 1411.

When Mr. Sogol informed the trial court that he had not had the opportunity to review some of McWilliams's DOC records, the court announced that it would give him time to review them and that the court itself also would review those records. *Id.* at 1421. The court then stated: "The court will entertain any motion

that you may have with some other person to review it. Otherwise, the Court will pronounce sentence at 2 o'clock." *Id.* His counsel did not move the court to appoint an expert to review Dr. Goff's report, and the court accordingly adjourned the proceedings until the afternoon. *Id.* at 1421-1422.

The sentencing hearing resumed at 2:15 p.m., and McWilliams's counsel renewed their motion for a continuance. *Id.* at 1423. The trial court denied that motion, but the court again invited his counsel "to make a motion to present someone to evaluate that[]," presumably referring to Dr. Goff's report and McWilliams's DOC records. His counsel again failed to make such a motion. *Id.* at 1424, 1429. Thus, the court twice offered his counsel the opportunity to make a formal motion requesting that someone be appointed to review Dr. Goff's findings, but his counsel rejected that invitation. They did move that Dr. Goff's report be admitted into evidence. *Id.* at 1420. The court granted that motion and considered the information contained in Dr. Goff's report and the information contained in the Lunacy Commission's report and Dr. Bivens's report in sentencing McWilliams. *Id.* at 1420-1421, 1652.

REASONS FOR DENYING THE PETITION

McWilliams asks this Court to hold that the state courts unreasonably erred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") by failing to follow a legal rule that this Court has never announced, much less "clearly

established." 28 U.S.C. § 2254(d). And even if McWilliams could overcome that legal hurdle, McWilliams's *Ake* claim essentially is an invitation to conduct fact-bound error correction against a set of facts that is statutorily presumed correct, *see* 28 U.S.C. § 2254(e)(1), and supported by the record. Simply put, this case is not worthy of certiorari review. *See* Rule 10, Rules of the Supreme Court of the United States.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT CANNOT ESTABLISH NEW FEDERAL LAW IN A CASE ARISING UNDER AEDPA.

When applying AEDPA, this Court "has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 1419 (2009) (reversing the granting of habeas relief because "this Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims"); *see also Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743 (2008) (reversing the granting of habeas relief because this Court's precedent had not clearly established that counsel's participation by speaker phone amounts to the complete denial of counsel); *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649 (2006) (reversing the granting of habeas relief because this Court's

precedent had not clearly established that the wearing of buttons by spectators is inherently prejudicial).

In his first question presented, McWilliams asks the Court to announce that *Ake* is not satisfied unless defendants who make the appropriate showing are provided with a partisan psychiatric expert who will report only to them. Pet. at 11-16. But this Court has never held, much less "clearly established," 28 U.S.C. § 2254 (d), that *Ake* mandates that the State provide defendants who make such a showing with a partisan expert who will report only to them. Instead, this Court held in *Ake* that, where defendants make such a showing, "[t]he obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, *and as we limit the right we recognize today*." *Ake*, 470 U.S. at 79, 105 S. Ct. at 1094 (emphasis added). And, the Court left "to the State the decision on how to implement this right." *Id.* at 83, 105 S. Ct. at 1096.

The only precedent that McWilliams cites in support of his expansive reading of this Court's holding in *Ake* is *Tuggle v. Netherland*, 516 U.S. 10, 116 S. Ct. 283 (1995). Pet. at 14. In that capital case, the Court vacated the lower court's decision based on its finding that the petitioner was not provided "with the assistance of an independent psychiatrist," in violation of *Ake*. *Tuggle*, 516 U.S. at 12, 116 S. Ct. at 284. But in reaching that result, this Court did not hold that capital defendants who make a showing that their mental-health issues could be

relevant to establishing a mitigating circumstance or, as in *Tuggle*, rebutting an aggravating circumstance, are entitled, under *Ake*, to a partisan expert who will report only to them. Instead, the Court's fact-specific holding in *Tuggle* focused on the trial court's failure to provide the petitioner with one competent psychiatric expert who could have rebutted the prosecution's future-dangerousness evidence. *Tuggle*, 516 U.S. at 11-12, 116 S. Ct. at 284.

In fact, by arguing that there is a circuit split on the question presented, McWilliams's petition recognizes that this Court has not clearly established the rule that a defendant must be appointed a partisan expert. He asserts that "there is an unresolved split among the federal circuits as to what *Ake* held." Pet. at 12. Some circuits, McWilliams asserts, follow his proposed rule. And some circuits have adopted a different interpretation of *Ake*. Given his argument that there is an active split in the federal circuits about the meaning of *Ake*, McWilliams cannot seriously contend that *Ake* "clearly established" the rule that he suggests this Court adopt.

In short, the Court has not "clearly established" a rule that defendants who make the requisite showing under *Ake* are entitled to partisan experts who will report only to them. That said, even if the Court wanted to adopt McWilliams's expansive view of *Ake* for the first time, McWilliams would not be entitled to habeas relief under AEDPA because the state courts reasonably applied *Ake* as it

existed in the 1980's. Thus, even if the Court were inclined to consider McWilliams's proposed new rule of law, the Court should deny McWilliams's cert petition and wait until a case presents this issue on direct appeal – not federal habeas review under § 2254(d).

II. EVEN IF THIS COURT COULD RESOLVE THE PURPORTED SPLIT IN A FEDERAL HABEAS CASE, THIS CASE IS A UNIQUELY BAD VEHICLE.

As explained above, the Court cannot resolve a purported split among the federal circuits over the meaning of one its precedents in a federal habeas case that requires the law to be "clearly established" as a precondition for relief. But, even if the Court could resolve such a purported split in a federal habeas case, this case presents this Court with a particularly poor vehicle. This is so for three reasons.

First, the lower court did not actually decide the issue that the cert petition presents. The lower court's decision is an unpublished, nonbinding opinion. It does not choose sides in the purported circuit split over whether *Ake* requires a partisan expert that reports only to the defendant's counsel. Instead, the lower court simply noted that McWilliams could not meet the "clearly established" standard for federal habeas relief because "the United States Supreme Court has thus far declined to resolve this" issue. Pet. App. B at 17.

Second, McWilliams's counsel did not preserve this issue in the state courts. As noted in the Statement above, McWilliams's counsel did not ask that an expert

be appointed to report directly to them. Instead, his counsel asked that the State be ordered to conduct mental-health testing – a motion that the state trial court granted. McWilliams never objected to the State or Dr. Goff, in particular, conducting the testing that he requested, nor did he object to Dr. Goff providing the results of his testing to the court and the State. Presumably he did not raise those objections because *he specifically requested* not only that the State perform that testing but also that the results of the testing be provided to the court, and not just to his counsel. McWilliams cannot now complain that it was improper for Dr. Goff to evaluate him because he was employed by the State or that it was improper for Dr. Goff to make the results of his testing available to the trial court and both parties. Pet. at 17.

Finally, the lower court correctly noted that the purported *Ake* error had no effect on McWilliams's sentence. McWilliams had been diagnosed as a malingerer by numerous psychologists. He had committed a highly-aggravated murder during a robbery and rape. The lower court reasonably held that, "even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence." Pet. App. B at 19.

III. THIS COURT SHOULD DENY CERTIORARI REVIEW BECAUSE MCWILLIAMS'S *AKE* CLAIM IS WITHOUT MERIT.

McWilliams argues that the assistance that he received from Dr. John R. Goff, the clinical neuropsychologist who evaluated him before his sentencing

hearing, did not satisfy the requirements of *Ake* because his counsel "never had the chance to discuss the report or underlying records with Dr. Goff." Pet. at 17-18. McWilliams's argument is based on a profound misunderstanding of the record, and because his *Ake* claim is meritless, this Court should deny certiorari review.

Under *Ake*, 470 U.S. at 79, 105 S. Ct. at 1094, capital defendants who make a showing that their mental-health issues could be relevant to establishing the existence of a mitigating circumstance or rebutting an aggravating circumstance are entitled to the "provision of one competent psychiatrist." This Court did not hold in *Ake* that the psychiatrist appointed for the defendant must be partisan and must report only to the defendant.

Here, McWilliams's counsel successfully moved the trial court to order neurological and neuropsychological testing of McWilliams after the jury returned its verdict recommending that he be sentenced to death in the hope that they could use the results of that evaluation as mitigation evidence at his sentencing hearing. (Vol. 8, p. 1615.) In particular, they moved the court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant ... with *the results made available to the court*." *Id.* (emphasis added). In granting that motion, the court gave his counsel exactly what they requested. The court ordered DOC to administer the tests that McWilliams's counsel identified in their motion and further ordered that the results be sent to the

Court Clerk's Office, where the court and the parties would have access to them. *Id.* at 1612. Because DOC was not equipped to conduct all of the tests that were mentioned in that order, McWilliams was transferred to Taylor-Hardin where he was evaluated by Dr. Goff. *Id.* at 1616-1617, 1620.

McWilliams's counsel were provided with Dr. Goff's report before his sentencing hearing, and they had every opportunity to consult with him, to ask him questions about his report, and to determine whether it would be in McWilliams's best interest to call him at the hearing. *Id.* at 1407. Dr. Goff lived and worked in the city where McWilliams was being tried, so it would have been easy for his counsel to meet with him. *Id.* at 1637. Indeed, in denying relief on McWilliams's *Ake* claim, the Alabama Court of Criminal Appeals noted that "[t]here is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." Pet. App. D at 5. The Alabama Court of Criminal Appeals was correct in so ruling.

The record reveals that neither the trial court nor the prosecution took any steps to prevent McWilliams's counsel from consulting with Dr. Goff. Instead, McWilliams's counsel did not speak with Dr. Goff even once before McWilliams's sentencing hearing because, for reasons that they never explained, they had "very little confidence" in his findings or, for that matter, in the findings that were

reached by the three members of the Lunacy Commission. (Vol. 8, p. 1411.) Thus, McWilliams's assertions in his petition that his counsel were not given the opportunity to consult with Dr. Goff are patently without merit.

When McWilliams's counsel informed the trial court at his sentencing hearing that they had little confidence in the findings of Dr. Goff and the Lunacy Commission and moved the court for a continuance, the court twice offered his counsel the opportunity to make a formal motion requesting that someone be appointed to review Dr. Goff's findings, but they rejected that invitation. (Vol. 8 at 1421, 1424, 1429.) After the court denied their motion for a continuance, McWilliams's counsel moved that Dr. Goff's report be admitted into evidence. *Id.* at 1420. The court granted that motion and considered the information contained in Dr. Goff's report and the information contained in the Lunacy Commission's report and Dr. Bivens's report in sentencing McWilliams. *Id.* at 1420-1421, 1652. ("The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative."). Thus, McWilliams's *Ake* claim is meritless because he was given and actually benefitted from the assistance of one competent psychiatric expert, which is all that *Ake* requires.

In denying relief on McWilliams's *Ake* claim, the Eleventh Circuit properly held that the state courts' adjudication of that claim was not contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and was not based on an unreasonable determination of the facts, reasoning as follows:

> McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake,* 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.
>
> Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Pet. App. B at 18.

As the Eleventh Circuit properly found, the Alabama Court of Criminal Appeals correctly denied relief on McWilliams's *Ake* claim and, at the very least, was not objectively unreasonable in reaching that conclusion. *Id.* Because

McWilliams is not entitled to any relief on his *Ake* claim, this Court should deny certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

LUTHER STRANGE
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General

Henry M. Johnson
Assistant Alabama Attorney General
Counsel of Record *

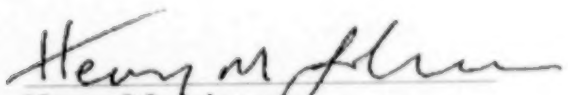
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637
hjohnson@ago.state.al.us

October 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this, the 17th day of October, 2016, a copy of the foregoing was served on the attorneys for Mr. McWilliams by placing the same in the United States mail, first class postage prepaid, and addressed as follows:

Mr. Stephen B. Bright, Esq.
Mr. Mark Loudon-Brown, Esq.
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, Georgia 30303



Henry M. Johnson
Assistant Alabama Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637
hjohnson@ago.state.al.us

October 17, 2016

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AND
BRIEFS

No. 16-5294

IN THE SUPREME COURT OF THE UNITED STATES

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
MARK LOUDON-BROWN
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
mloudonbrown@schr.org

October 28, 2016

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REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE MISUNDERSTANDING OF A MINORITY OF CIRCUITS CONCERNING WHAT *AKE* SAID.

The State of Alabama incorrectly frames the question presented as a request that this Court announce new law. Alabama's Br. at ii, 14. Contrary to what the State argues in Part I of its Brief in Opposition, this Court need only reiterate what it clearly held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), but has been misunderstood by a minority of federal circuit courts. *Ake* clearly established an indigent defendant's right to meaningful expert assistance. *Ake*, 470 U.S. at 82. To be meaningful, that assistance must be independent. *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) ("[W]e held in *Ake* . . . that when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist."). Thus, this Court has "squarely established" that due process requires that an indigent defendant have meaningful access to an independent expert. *Cf.* Alabama Br. at 13.

Simply because there are circuits that have incorrectly construed *Ake*, thereby creating a circuit split, does not diminish the clarity with which *Ake* spoke. In *Williams v. Taylor*, 529 U.S. 362, 377 (2000), for example, this Court rejected the notion that "a state-court judgment is 'unreasonable' in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable". *Cf.* Alabama Br. at 16. In other words, it still can be unreasonable to interpret *Ake* to

require less than an independent expert, even though a jurist or circuit elsewhere had the same mistaken interpretation.

In this case, the prosecutor presented psychiatric evidence against McWilliams at his sentencing hearing, but McWilliams did not receive the assistance of an independent psychiatrist in return, and was thereby denied meaningful expert assistance. This Court should grant certiorari to ensure that McWilliams receives the due process guarantees *Ake* established.

II. THIS CASE IS AN IDEAL VEHICLE.

The State makes three arguments as to why this case presents a poor vehicle for this Court to reiterate the clarity with which *Ake* spoke. None of the arguments are meritorious.

First, the initial question presented in the Petition for Writ of Certiorari is whether *Ake* clearly established that due process requires expert assistance to be independent of the prosecution. Pet. at i. The Eleventh Circuit below held that *Ake* did not clearly establish that right. *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 706 (11th Cir. 2015) ("the State's provision of a neutral psychologist would not be 'contrary to, or involve[ ] an unreasonable application of, clearly established Federal law'"). The State's argument that the lower court did not decide that question, Alabama Br. at 16, is wrong.

Second, the Eleventh Circuit below, via three separate opinions—a per curiam, a concurrence, and a dissent—addressed whether McWilliams was deprived of due process under *Ake v. Oklahoma* because the State failed to provide him with

the meaningful assistance of an independent mental health expert for use at his sentencing hearing. *McWilliams*, 634 F. App'x at 706 ("we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law") (per curiam); *id.* at 712 (characterizing McWilliams's *Ake* claim as "close") (Jordan, J., concurring); *id.* at 718 ("the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect") (Wilson, J., dissenting). Judge Wilson was so persuaded by the *Ake* claim that he authored a lengthy dissent indicating why McWilliams should receive a new sentencing hearing. *Id.* at 712-18. Therefore, the State's argument that McWilliams did not preserve the *Ake* issue in the state courts, Alabama Br. at 16-17, is wrong as well.

Third, the State argues that this case is a poor vehicle because the lower court was correct in noting that any error had no effect on McWilliams's sentence. Alabama Br. at 17. The State captures the prejudice in its very next sentence, however, when it observes that "McWilliams had been diagnosed as a malingerer by numerous psychologists." Alabama Br. at 17. Had McWilliams been granted the meaningful assistance he needed and requested, he could have presented, to take just one example, Dr. Goff's conclusions that McWilliams had a diagnosable mental health impairment and that his personality testing did not yield a "fake-bad" assessment, but rather was indicative of a "cry-for-help." (Vol. 8 at 1635.) The trial court's refusal to grant McWilliams's trial attorneys the time and assistance they

needed to present those results in a meaningful way prevented them from painting a complete picture of McWilliams's mental health.

Because McWilliams did not receive meaningful expert assistance, he was unable to challenge the prosecution's prejudicial expert opinions. Instead, those opinions went uncontested and led to a death sentence. Thus, as Judge Wilson observed in his dissent, "McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting). That due process violation makes this death penalty case ideal for this Court to hear.

III. MCWILLIAMS'S UNDERLYING *AKE* CLAIM IS MERITORIOUS BECAUSE DR. GOFF, BY WORKING SIMULTANEOUSLY WITH THE PROSECUTION, WAS NECESSARILY UNABLE TO PROVIDE MEANINGFUL EXPERT ASSISTANCE.

Throughout much of its Brief in Opposition, particularly in Part III, the State attempts to shift the focus of the Petition for Certiorari from what *Ake* clearly established to what McWilliams's trial lawyers did or did not say and do in preparing for and litigating McWilliams's sentencing hearing. Alabama Br. at 17-20. In so doing, the State focuses on facts that are irrelevant to the questions presented and begs the initial dispositive question. That is, McWilliams was deprived his rights to due process because he never had access to the assistance of an independent expert, and thus McWilliams was denied an expert who could meaningfully "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

For example, the State argues that the defense lawyers got everything they asked for but chose not to meet with Dr. Goff and were never prevented from doing so. Alabama Br. at 18-19. Whether those assertions are factually accurate or not is entirely beside the point. Rather, the defense was never able to meet with Dr. Goff meaningfully, *precisely because* he was reporting simultaneously to the prosecution and never had access to McWilliams's psychological records from Holman Prison. *McWilliams*, 634 F. App'x at 715 (Wilson, J., dissenting). Thus, Dr. Goff's assistance was necessarily incomplete and the defense never received meaningful assistance, regardless of any dispute over what the trial attorneys did.

Moreover, the State's account of what McWilliams's trial lawyers did is incomplete. Once the defense finally received a report indicating that McWilliams had significant mental health impairments and, on the very morning of sentencing, received voluminous medical and psychological records they had requested long ago, (Vol. 8 at 1406, 1618, 1635-36), counsel noted that they were "unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing." (Vol. 8 at 1408.) Counsel made repeated requests for additional time to ensure meaningful expert assistance and, when those requests were denied, moved, without success, to withdraw. (Vol. 8 at 1404, 1406, 1408-11, 1423-28.) McWilliams was thus unable to present evidence of mitigating circumstances, rendering the sentencing hearing "unconscionable" and "a mockery." (Vol. 8 at 1644.)

Yet the State goes so far as to say that McWilliams—who was sentenced to death after the trial court found that he was malingering and manipulative—"actually benefitted" from Dr. Goff's assistance. Alabama Br. at 20. The fact that the trial judge found that McWilliams's mental health was *not* a mitigating circumstance (Vol. 8 at 1652) undermines that argument and starkly illustrates the deficiency of information the trial judge had regarding McWilliams' mental health, especially given that the defense "case for mitigation was based on his mental health history." *McWilliams*, 634 F. App'x at 716 (Wilson, J., dissenting).

Note, finally, that the jury's vote was ten for death and two for life in prison. Had just one more juror been moved by the additional mitigating mental health evidence, the jury's recommendation to the judge would have been life in prison, rather than death. *See* Ala. Code § 13A-5-46(f). Nevertheless, McWilliams was deprived the ability to present his mental health history in a meaningful way prior to being sentenced to death, in violation of "a bedrock premise on which our system of capital punishment depends." *Elmore v. Holbrook*, 580 U.S. ____, *15 (2016) (Sotomayor, J., dissenting from denial of certiorari).

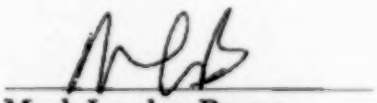
CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the denial of habeas relief.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on October 28, 2016, I served a copy of the foregoing via first-class mail, postage prepaid, and via email, upon counsel for the Respondent:

Henry M. Johnson
Assistant Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel. 334-353-9095
hjohnson@ago.state.al.us



Mark Loudon-Brown

No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Michael B. DeSanctis
Counsel of Record
Scott B. Wilkens
Marina K. Jenkins
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, DC 20001
(202) 636-6000
mdesanctis@jenner.com
swilkens@jenner.com

Counsel for *Amicus Curiae*

August 19, 2016

Supreme Court, U.S.
FILED
AUG 19 2016
OFFICE OF THE CLERK

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INTERESTS OF AMICUS CURIAE[1]

The Constitution Project ("TCP") is an independent, not-for-profit organization that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues, such as the right to counsel in criminal trials. TCP achieves its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. TCP is deeply concerned with the preservation of fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. TCP frequently appears as *amicus curiae* before this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

TCP's National Right to Counsel Committee ("Committee") is a bipartisan collective of independent experts representing all segments of America's justice system. Established in 2004, this blue-ribbon committee includes Democrats and Republicans, former judges, prosecutors, defense lawyers, victim

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[1] Pursuant to Rule 37.2, *amicus* notified counsel of record for all parties of its intent to file an *amicus* brief. Consent was timely requested, and the parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission.

advocates, and others. The Committee's mission is to examine, across the country, whether criminal defendants and juveniles charged with delinquency, who are often unable to retain their own lawyers, receive adequate legal representation. A list of the Committee's membership is attached hereto at the Appendix.

The Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. As relevant here, the Committee emphasized that, commensurate with their obligation under *Gideon v. Wainwright*, states must ensure access to independent experts to assist the indigent accused. *Justice Denied* has garnered public praise from a wide array of public figures, and it has been cited in a variety of national news publications, state newspapers, and court opinions.

SUMMARY OF ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court determined that indigent defendants are entitled under the Due Process clause to the assistance of a mental health professional in cases where that assistance is

necessary to assure the defendant meaningful access to justice. Principles of fundamental fairness require it, and "the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture," *Evitts v. Lucey*, 469 U.S. 387, 397 (1985), without it. The entitlement to a mental health expert under *Ake* thus demands that the expert be dedicated to the defendant, and committed to assisting in the defense. Only with a dedicated mental health expert is a criminal defendant likely able to establish the confidential relationship that is a fundamental precondition to obtaining the most accurate and reliable mental health assessment possible. That is one reason why any non-indigent criminal defendant would hire a confidential, dedicated expert, and is why *Ake* requires access to the same confidential, dedicated expert for indigent criminal defendants.

The current split in judicial authority over what the Due Process clause and *Ake* require has created two starkly different legal and clinical environments for indigent criminal defendants. Thousands of indigent criminal defendants have mental health conditions that bear on their culpability or sentence.[2] But depending

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[2] *See* Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006) (as of 2005, "56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates" "had a mental health problem"), http://www.bjs.gov/content/pub/pdf/mhppji.pdf; *see also* Nat'l Inst. Of Mental Health, *Inmate Mental Health*, http://www.nimh.nih.gov/health/statistics/prevalence/inmate-mental-health.shtml (last visited Aug. 18, 2016); Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert*

on where they are tried, they participate in what is, in effect, two very different systems. In one, both non-indigent and indigent criminal defendants have access not only to the actual assistance of a dedicated mental health expert but also, and as a consequence, to a mental health assessment conducted with the confidentiality necessary to ensure for the trier of fact the accuracy and reliability of the assessment. In the other, only an indigent (as opposed to non-indigent) criminal defendant's mental health is examined and assessed in a more inquisitorial setting – in a way that is almost uniquely anomalous in our adversarial system of justice – which lacks the confidentiality that best ensures the accuracy and reliability of the assessment. The Court should grant the Petition in this case and resolve the legal disagreement that has given rise to these two very different clinical realities for thousands of criminal defendants nationwide.

ARGUMENT

I. An Indigent Defendant Must Have Access to a Dedicated Mental Health Professional in Order for that Entitlement to be Meaningful in an Adversarial System.

The holding in *Ake v. Oklahoma* was an expansion of preceding due process cases that had gradually but consistently expounded upon the "elementary

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Assistance, 60 Okla. L. Rev. 283, 302 (2007) ("Although estimates vary, some sources indicate that as many as 70 percent of death-row inmates suffer from some form of schizophrenia or psychosis" (quoting Brief for Respondent at 40, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407))).

principle" that the Due Process Clause protects the rights of indigent defendants to have the same opportunity for fair representation as affluent defendants. 470 U.S. at 76. By the time the Court decided *Ake*, it had "long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.*; *see also, e.g.*, *Medina v. California*, 505 U.S. 437, 444-45 (1992) (understanding *Ake* as an expansion of earlier due process cases).[3]

This principle of "fundamental fairness" developed out of the Court's "belief that justice cannot be equal where, simply as a result of his poverty, a defendant is

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[3] *See Powell v. Alabama*, 287 U.S. 45, 71-73 (1932) (right of indigent defendants incapable of adequately defending themselves to state-provided defense attorneys in capital cases); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right of indigent noncapital defendants to appeal without paying for trial transcripts); *Burns v. Ohio*, 360 U.S. 252 (1959) (right of indigent defendants to file an appeal without being required to pay a fee); *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961) (right of indigent defendants to access writ of habeas); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendants to counsel at trial in noncapital cases); *Douglas v. California*, 372 U.S. 353 (1963) (right of indigent defendants to counsel in first appeal as of right); *Lane v. Brown*, 372 U.S. 477 (1963) (rejecting screening procedures used to reduce frivolous appeals by indigents); *Draper v. Washington*, 372 U.S. 487 (1963) (same); *In re Gault*, 387 U.S. 1, 41 (1967) (right of indigent juveniles to appointed counsel); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (right of free transcripts on appeal extended to non-felons); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel); *Evitts v. Lucey*, 469 U.S. 387 (1985) (same).

denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 U.S. at 76; *see Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). This is not to say that the State must purchase for an indigent defendant "all of the services that the wealthy may buy." *Johnson v. Oklahoma*, 484 U.S. 878, 880 (1987) (citing *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)). To be sure, *Ake* did not grant "a constitutional right to choose a psychiatrist of [the defendant's] personal liking or to receive funds to hire his own." 470 U.S. at 83. But the State does have an obligation to "provide the defendant with the 'basic tools of an adequate defense.'" *Johnson*, 484 U.S. at 880 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Under *Ake*, those "basic tools" must include the assistance of a mental health expert when one is necessary. 470 U.S. at 82-83.

The expansion over time of the due process rights of indigent defendants has served to ensure that those defendants obtain *meaningful* access to justice. *See Ake*, 470 U.S. at 77. "[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process." *Id.* State proceedings against an indigent defendant are "fundamentally unfair" unless the State "mak[es] certain that [the defendant] has access to the raw materials integral to the building of an effective defense." *Id.* In cases turning on issues of mental health, meaningful access to justice requires access to a mental health professional who is dedicated to the defendant. It is not sufficient that a state

provide access only to a single, non-confidential expert working equally for the prosecution as well as the defense.

Indeed, for an indigent defendant's access to justice to be meaningful as the Court has prescribed, the defendant must "have a reasonable chance of success" against the prosecution. *Ake*, 470 U.S. at 83. This necessarily contemplates the competing interests between the defendant and the prosecution intrinsic in our adversarial system. Indeed, *Ake* tells us that in order to protect a defendant's due process rights, a mental health professional must be made available to the defendant for the purpose of providing assistance to the defendant *for the defense*. *Id.* ("[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.").[4] As Justice Marshall wrote several years after writing for the Court in *Ake*, an indigent defendant's "right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court." *Graviel v. Texas*, 495 U.S. 963, 965 (1990) (Marshall, J., dissenting from denial of certiorari); *see also Vickers v. Arizona*, 497 U.S. 1033, 1036 (1990) (Marshall, J., dissenting from denial of certiorari) ("*Ake* requires the appointment of a psychiatrist who will assist in the preparation of the

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[4] This includes, specifically, at the sentencing phase. *See Ake*, 470 U.S. at 84 ("[D]ue process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.")

defense, not one who will merely give an independent assessment to the judge or jury."). Even Justice Rehnquist's dissent in *Ake* confirms that, at the very least, what "the defendant should be entitled to" under *Ake* is access to "a psychiatrist who acts independently of the prosecutor's office." 470 U.S. at 92 (Rehnquist, J., dissenting); *see also Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (per curiam) ("[D]ue process requires that the State provide the defendant with the assistance of an independent psychiatrist.").

The necessity of a dedicated expert is made clear when one considers the defendant's potential need or desire to conduct a cross-examination of the State's mental health expert. "[A] state witness unbalanced by a defense expert testifies from an initially and unashamedly partisan stance," and "can offer testimony that is valid, but debatable—even inaccurate or false—while the defendant has no chance to counter the testimony and little ability to mount an effective cross-examination." Emily J. Gorendyke, Ake v. Oklahoma: *Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367, 388 (2007). Even a truly neutral expert may "penalize the defendant by presenting a single view of the evidence to the jury, while the defense attorney will not have the knowledgeable assistance necessary to prepare an effective cross-examination." *Id.*

This Court has previously recognized the harm that results when a mental health assessment by the State goes unbalanced or unchallenged. In *Tuggle*, for example, the failure to provide an indigent defendant with the assistance of an independent psychiatrist

"prevented [the defendant] from developing his own psychiatric evidence to rebut the [prosecution's] evidence and to enhance his defense in mitigation." 516 U.S. at 13. This left the prosecution's evidence unchallenged, "which may have unfairly increased its persuasiveness in the eyes of the jury." *Id.* Accordingly, the Court acknowledged that "the absence of such evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment." *Id.* at 14. Likewise, the Court noted in *Ford v. Wainwright* that "without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information." 477 U.S. 399, 414 (1986). The consequence could not be more clear, or more dire: "The result is a much greater likelihood of an erroneous decision," *id.*

Accordingly, to the extent that *Ake* contemplates giving indigent defendants access to a mental health expert, it necessarily envisions such an expert working with the defense to assist in opposing the prosecution and any prosecution mental health expert. *Ake* consistently discusses a system of "psychologists for each party"—the defense and the prosecution—who present their "differences in opinion" for the jury to resolve. 470 U.S. at 81. The appointed defense expert thus serves the role of, among other things, "offer[ing] a well-informed . . . opposing view," and "rais[ing] in

the jurors' minds questions about the State's proof of an aggravating factor." *Id.* at 84. This approach ensures an indigent defendant's basic right to participate in our adversarial legal system, and reflects what is necessary for that process to be fair. Indeed, the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser," *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), because "our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interest," *Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981).

The federal courts of appeals are deeply divided on the question of whether *Ake* and the Due Process Clause require (1) a confidential mental health expert dedicated to the defense, or (2) a mental health expert equally available to the defense, the prosecution, and the court.[5] This Court's intervention is urgently needed to ensure that *Ake* and the Due Process Clause are followed and implemented consistently on a nationwide basis.

II. A Confidential Relationship with the Mental Health Expert Is Critical to Ensuring the Accuracy and Reliability of the Mental Health Assessment.

In *Ake*, itself, the Court acknowledged the importance of the accuracy of the mental health examination, emphasizing that "[t]he private interest in

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[5] A full discussion of the split among the United States Courts of Appeals can be found in the Petition at 11-16.

the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling," 470 U.S. at 78, and that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense . . . the risk of an inaccurate resolution of sanity issues is extremely high," *id.* at 82. Indeed, the State's "interest in the fair and accurate adjudication of criminal cases" weighs against even "[t]he State's interest in prevailing at trial." *Id.* at 79.

It has long been recognized that the accuracy of any mental health examination depends fundamentally on the patient's being candid and frank with the professional conducting the examination. The personal evaluation of a defendant "may not yield an adequate clinical base if legal and other situational factors impede unrestricted and undistorted communication." Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 496-97 (1980); *see also United States v. Leonard*, 609 F.2d 1163, 1165-66 (5th Cir. 1980) ("[T]he psychiatric inquiry cannot succeed unless the defendant cooperates; a defendant's mental condition would not be discovered in many instances unless the psychiatrist can engage in a candid conversation with the defendant about it.").

A mental health evaluation by an expert often includes "an accurate medical, developmental, psychological and social history," a "physical and neurological examination," a "psychiatric and mental status examination," "diagnostic studies," and any

additional specialized tests. Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 Am. J. Forensic Psychiatry 43, 46 (1994).[6] For mental health experts engaged to evaluate criminal defendants, capturing the full scope of clinically relevant information is no less essential. It is critical that the clinician collect "[a]n adequate social, developmental and medical history" in order to conduct a mental health evaluation, a step which "has been called the 'single most valuable element to help the clinician reach an accurate diagnosis.'" *Id.*[7]

When an indigent criminal defendant is unable to be candid with an examining mental health expert, however, the expert will not be able to conduct this most critical assessment. "If the legal system values a thorough forensic evaluation, it must encourage the defendant's full cooperation." Bonnie & Slobogin, 66 Va. L. Rev. at 497. In turn, the defendant's full participation and cooperation requires the existence of a confidential relationship between the defendant and the expert clinician. Confidentiality is a fundamental touchstone of the relationship between a mental health professional and her clients. *See* Am. Psychiatric Ass'n, *The Principles of Medical Ethics, With Annotations*

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[6] Available *at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1994_mental_health.authcheckdam.pdf.

[7] Quoting HI Kaplan & BJ Sadock: *Comprehensive Textbook of Psychiatry* (4th ed. 1985).

Especially Applicable to Psychiatry 6 (2013)[8] ("Confidentiality is essential to psychiatric treatment."); Am. Psychol. Ass'n, Psychology Help Center: *Protecting your privacy: Understanding confidentiality*[9] ("Psychotherapy is most effective when you can be open and honest.").

As this Court recognized in acknowledging a psychotherapist-patient privilege, "a psychiatrist's ability to help her patients 'is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality.'" *Jaffee v. Redmond*, 518 U.S. 1, 10-11 (1996) (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, *Confidentiality and Privileged Communication in the Practice of Psychiatry* 92 (June 1960)) (alterations in *Jaffee*)). Indeed, Courts have long acknowledged that "a psychiatrist must have his patient's confidence or he cannot help him." *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *see also Caesar v. Mountanos*, 542 F.2d 1064, 1067 (9th Cir. 1976) ("[P]sychotherapy is . . . dependent on absolute confidentiality.").

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[8] *Available at* https://www.psychiatry.org/psychiatrists/practice/ethics.

[9] *Available at* http://apa.org/helpcenter/confidentiality.aspx (last visited Aug. 18, 2016).

Professional ethical standards for mental health clinicians likewise reflect the fundamental underpinning of confidentiality in their practice. Psychologists, for example, "have a primary obligation . . . to protect confidential information" obtained from a client. Am. Psychol. Ass'n, *Ethical Principles of Psychologists and Code of Conduct, Standard 4: Privacy and Confidentiality*, 4.01 Maintaining Confidentiality (2010).[10] Disclosure is only permitted with the client's consent or if it is required or permitted by law. *Id.*, 4.05 Disclosures. Likewise for psychiatrists. *See* Am. Psychiatric Ass'n, *The Principles of Medical Ethics* 6 ("A psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion."). The same code of professional conduct applies to mental health professionals who provide their expertise in connection with legal proceedings. Forensic clinicians practice under the same "ethical obligations to maintain the confidentiality of information relating to a client or retaining party" and with the same rules regarding disclosure. Am. Psychol. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68 Am. Psychologist 7, 14 (2013).[11]

When there is a lack of confidentiality, however – as with a mental health expert answering equally to defense and prosecution alike – the clinician faces an

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[10] *Available at* http://www.apa.org/ethics/code/.

[11] *Available at* http://www.apa.org/practice/guidelines/forensic-psychology.pdf.

ethical dilemma because the lack of confidentiality conflicts with "obtaining information in an open and honest manner." Matthew T. Huss, *Forensic Psychology: Research, Clinical Practice, and Applications* 66 (2009). The forensic evaluator knows that "the assessment will be more accurate if the information he obtains from the parties involved is believed to be confidential," because if the client "believes that everything she discusses is confidential, she will be more likely to reveal information that is harmful to her legally [but also] potentially relevant to the evaluation." *Id.*; *see also* 1 Cyril H. Wecht, *Forensic Sciences* § 21.05(e) (Matthew Bender 2016) (discussing the "inhibiting effect" of the lack of confidentiality in a forensic evaluation). But the clinician must be clear about the lack of confidentiality in the evaluation, despite the diminished quality of assessment that will result as a consequence of that clarity. Huss, *Forensic Psychology* at 66. The American Bar Association has acknowledged this ethical dilemma, and warns that a client may become "unduly trustful" if the clinician weighs reaching a more accurate assessment over the need to be absolutely clear that the content of the evaluation will not be kept confidential. Am. Bar Ass'n, *ABA Criminal Justice Mental Health Standards*, Standard 7-1.1 *Commentary* (1989).

It is thus widely accepted that "[t]he most powerful legal disincentive to full disclosure is the defendant's fear that what he says during the forensic evaluation will be used against him in court." Bonnie & Slobogin, 66 Va. L. Rev. at 497. And it is equally clear that the

assessment of a non-dedicated clinician's assessment will be inhibited, and thus less accurate, because of the lack of confidentiality in the clinician's relationship with the defendant. Absent the accuracy that only a confidential clinical relationship can best ensure, mental health experts cannot render the meaningful assistance that *Ake* guarantees or the reliability to which the triers of fact should be entitled.

And only with an expert dedicated to assisting the defense through a confidential examination can the defense make an informed decision whether to relinquish the right to confidentiality by having the expert testify, or instead forego presenting the expert and utilize the expert to prepare its cross-examination of the prosecution experts, depending on which alternative is in the client's best interests. This informed decision cannot be made by the client alone. Rather, it must be made after the client has a confidential relationship with the expert and the expert then consults with the defense following the evaluation.

Ake entitles indigent defendants to an approximation of the mental health assistance available to non-indigent defendants. Non-indigent defendants are able to afford dedicated, confidential experts, and benefit accordingly from the confidentiality and accuracy of the assistance they can provided. Indeed, it hardly needs stating that, where a criminal defendant has financial means, no defense attorney would rely on a non-confidential mental health expert made equally available to the prosecution and the court. Due Process thus requires that indigent criminal defendants not be so limited. "Counsel should have the right to protect

the confidentiality of communications with the persons providing such [expert] services to the same extent as would counsel paying such persons from private funds." *Am. Bar Ass'n Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 952 (2003) (Guideline 4.1(B)(2)). This can be achieved only where *Ake* is properly understood to entitle indigent defendants to a dedicated, confidential mental health expert.

CONCLUSION

The petition for writ of certiorari should be granted.

Michael B. DeSanctis
Counsel of Record
Scott B. Wilkens
Marina K. Jenkins
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, DC 20001
(202) 636-6000
mdesanctis@jenner.com
swilkens@jenner.com

Counsel for *Amicus Curiae*

APPENDIX

The Constitution Project
National Right to Counsel Committee

Co-Chairs

Rhoda Billings
Professor Emeritus, Wake Forest Law School; Chief Justice, North Carolina Supreme Court, 1985-1986, Judge, State District Court, 1968-1972

Robert M. A. Johnson
District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association

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Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; Assistant United States Attorney, Western District of Pennsylvania, 1983-1991; Assistant District Attorney, Allegheny County, Pennsylvania, 1980-1983

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(Honorary Co-Chair) Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987

Members
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Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter

Jay W. Burnett
Adjunct Law Professor South Texas College of Law: Texas Criminal Procedure' Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000

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Director of Research, Justice Center of the Council of State Governments; Senior Associate The JFA Institute, 2003-2005; Executive Director, Texas Criminal Justice Policy Council, 1991-2003

Norman S. Fletcher
Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005

Monroe H. Freedman
Professor of Law, 1973-present, and Dean, 1973-1977, Hofstra University School of Law

Stephen F. Hanlon
Professor of Practice, Saint Louis University School of Law

Susan Herman
Associate Professor of Criminal Justice and Human Services, Pace University; former Executive Director, National Center for Victims of Crime

Bruce R. Jacob
Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*

Abe Krash
Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*

Norman Lefstein
Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis

Charles J. Ogletree, Jr.
Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School

Bryan Stevenson
Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law

Larry D. Thompson
Senior Vice President & General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; United States Attorney, Northern District of Georgia, 1982-1986

Hubert Williams
President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

AFFILIATIONS ARE LISTED FOR PURPOSES OF IDENTIFICATION ONLY

AND BRIEFS

No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

ANDREW L. BRASHER*
Solicitor General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Respondents

STEPHEN B. BRIGHT*
MARK LOUDON-BROWN
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

* *Counsel of Record*

PETITION FOR CERTIORARI FILED JULY 15, 2016
CERTIORARI GRANTED JANUARY 13, 2017

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 2013-13906

Date Filed	Docket Text
	***
10/07/2013	USDC order denying COA as to Appellant James McWilliams was filed on 10/07/2013. Docket Entry 105.
	***
10/25/2013	*MOTION for certificate of appealability filed by James McWilliams. Opposition to Motion is Unknown. [7008140-1] (ECF: William Montross)*
	***
12/16/2013	ORDER: Motion for certificate of appealability filed by Appellant James McWilliams is GRANTED in part and DENIED in part. [7008140-2] CRW
	***
02/26/2014	Appellant's brief filed by James McWilliams. Service date: 02/26/2014 [13-

13906] Attorney for Appellant: Montross - email; Attorney for Appellant: Singleton - email; Attorney for Appellee: Crenshaw - email; Attorney for Appellee: Johnson - email. (ECF: William Montross)

***

05/20/2014 Appellee's Brief filed by Appellees Attorney General, State of Alabama, Commissioner, Alabama Department of Corrections and Holman CF Warden.-- [Edited 05/20/2014 by JSC] (ECF: Henry Johnson)

06/02/2014 Reply Brief filed by Appellant James McWilliams. (ECF: William Montross)

***

06/04/2014 Oral argument scheduled. Argument Date: Wednesday, 07/23/2014 at 2:00 p.m. Argument Location: Atlanta Courtroom: Atlanta 339.

07/23/2014 Oral argument held. Oral Argument participants were William Montross, Jr. for Appellant James McWilliams, Palmer Singleton (present but did not argue) for Appellant James McWilliams and Henry M. Johnson for Appellees Attorney General, State of Alabama, Commissioner,

Appendix A

Alabama Department of Corrections and Holman CF Warden.

***

12/16/2015	Opinion issued by court as to Appellant James McWilliams. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
12/16/2015	Judgment entered as to Appellant James McWilliams.
01/05/2016	Petition for rehearing en banc (with panel rehearing) filed by Appellant James McWilliams. (ECF: Palmer Singleton)

***

02/16/2016	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant James McWilliams are DENIED. [7699416-1]

***

Appendix A

02/24/2016	Mandate issued as to Appellant James McWilliams.
03/28/2016	Extension for filing certiorari GRANTED until July 15, 2016, by U.S. Supreme Court as to Appellant James McWilliams.
07/20/2016	Notice of Writ of Certiorari filed as to Appellant James McWilliams. SC# 16-5294.

***

01/13/2017	Writ of Certiorari filed as to Appellant James McWilliams is GRANTED. SC# 16-5294.

****

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (WESTERN) CIVIL DOCKET FOR CASE #: 7:04-CV-02923-RDP

Date Filed	#	Docket Text
10/06/2004	1	PETITION for Writ of Habeas Corpus filed (referred to Magistrate-Judge Robert R. Armstrong Jr) (BST) (Entered: 10/07/2004)
		***
12/17/2004	10	ANSWER to petition for writ of habeas corpus by Respondents'.(KSS,) (Entered: 12/17/2004)
12/17/2004	11	Brief on the ground for relief presented in petition for writ of habeas corpus filed by Respondents'. (KSS,) (Entered: 12/17/2004)
12/17/2004	12	Habeas Corpus Checklist by Respondents' re 10 Answer to Complaint (exhibits bounded separately in 3 boxes.) (KSS,) (Entered: 12/17/2004)
		***

Appendix A

02/07/2005	16	REPLY Brief filed by Petitioner James. McWilliams re: 10 Answer to Complaint filed by James. McWilliams. (Strickland, Stephen) (Entered: 02/07/2005)

***

02/01/2008	55	REPORT AND RECOMMENDATION the mag judge recommends that the petition for writ of habeas corpus and his requests for an evidentiary hearing be DENIED, the parties have until 2/15/2008 to file objections. Signed by Judge R David Proctor on 2/1/2008. (KSS,) (Entered: 02/01/2008)

***

02/25/2008	57	OBJECTION to 55 Report and Recommendations *Petitioner's Objections To The Magistrate's Report and Recommendation* by James. McWilliams. (Strickland, Stephen) (Entered: 02/25/2008)

***

12/01/2008	63	FINAL OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATIONS filed by James McWilliams. (Strickland,

Stephen) Modified on 12/1/2008 (KSS,). (Entered: 12/01/2008)

***

08/25/2010	75	MEMORANDUM OPINION. Signed by Judge R David Proctor on 8/25/2010. (AVC) (Entered: 08/25/2010)
08/25/2010	76	ORDER OF DISMISSAL-In accordance with the Memorandum Opinion entered contemporaneously herewith, the petition for a writ of habeas corpus is hereby DISMISSED with prejudice. Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court DENIES a certificate of appealability. Costs are taxed to Petitioner. Signed by Judge R David Proctor on 8/25/2010. (AVC) (Entered: 08/25/2010)
09/24/2010	77	NOTICE OF APPEAL by James. McWilliams. (Strickland, Stephen) (Entered: 09/24/2010)

***

Appendix A

01/03/2011	80	ORDER of USCA as to 77 Notice of Appeal. Petitioner's Motion for Substitution of Counsel and Leave to file an Amended or Supplemental Application for Certificate of Appealability is GRANTED. Signed by USCJ Charles R. Wilson. (AVC) (Entered: 01/04/2011)
12/01/2011	81	ORDER of USCA as to 77 Notice of Appeal. Before Edmondson, Barkett, and Wilson, Circuit Judges. The court GRANTS a certificate of appealability on the issue futher set out in this order. Per curiam opinion attached. (AVC) (Entered: 12/01/2011)
	***	
09/10/2012	83	ORDER of USCA as to 77 Notice of Appeal. The appeal is VACATED and REMANDED to the District Court. Before Dubina, Chief Judge, and Barkett and Wilson, Circuit Judges. (AVC) (Entered: 09/10/2012)
	***	
04/17/2013	96	MEMORANDUM OPINION. Signed by Judge R David Proctor on 4/17/13. (KGE,) (Entered: 04/17/2013)

04/17/2013	97	ORDER ADOPTING REPORT AND RECOMMENDATIONS as set out. Signed by Judge R David Proctor on 4/17/13. (KGE,) (Entered: 04/17/2013)
05/13/2013	98	MOTION to Alter Judgment *Pursuant to Fed. R. Civ. P. 59(e)* by James. McWilliams. (Montross, William) (Entered: 05/13/2013)
07/24/2013	99	ORDER ON RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT-The motion 98 is DENIED. Signed by Judge R David Proctor on 7/24/2013. (AVC) (Entered: 07/24/2013)
08/14/2013	100	MOTION for Certificate of Appealability by James. McWilliams. (Montross, William) (Entered: 08/14/2013)

***

02/24/2016	109	USCA JUDGMENT as to 101 Notice of Appeal. Before Tjoflat, Wilson, and Jordan, Circuit Judges affirming the decision of the District Court. Issued as mandate on 2/24/2016 with per curiam opinion attached. (Attachments: # 1 usca opinion)(AVC) (Entered: 02/26/2016)

****

Appendix A

COURT OF CRIMINAL APPEALS
FORMAL DOCKET SHEET
CRIMINAL APPEALS NO. 6 DIV. 190

RECORD ON APPEAL FILED:	1/26/89 (8 Vols)
CERT. OF COMP. DATE:	1/26/89
Supplemental Record:	2/3/89
Supplemental Record:	4/18/89
Briefs:	
Brief filed:	10/31/90
Reply Brief filed:	2/22/91
Brief on return to remand filed:	6/16/94
Brief filed:	1/18/91
Supplemental Brief Filed:	4/25/91
7-day extension to:	7/14/94
Brief unremanded filed:	7/14/94

Date Filed	**Docket Text**
	***
05/7/1991	ARGUED AND SUBMITTED (E)
	***
08/23/1991	AFFIRMED. OPINION ISSUED.
09/06/1991	Application of Rehearing filed by Mr. Loewy. 7 days allowed for filing brief

Appendix A

09/13/1991	Brief in support of application for rehearing filed.
05/01/1992	APPLICATION FOR REHEARING OVERRULED.
05/11/1992	Petition for Certiorari filed in Alabama Supreme Court.
01/29/1993	The Court of Criminal Appeals is affirmed as to conviction; case remanded with instructions as to sentence.
	***
03/04/1994	AFFIRMED AS TO CONVICTION, REMANDED WITH INSTRUCTIONS AS TO SENTENCE. OPINION ISSUED.
	***
09/09/1994	AFFIRMED (on return to remand). OPINION ISSUED.
	***
03/03/1995	APPLICATION FOR REHEARING OVERRULED.
03/20/1995	Petition for Certiorari filed in Alabama Supreme Court. (LATE)

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03/23/1995	Writ granted by Alabama Supreme Court.
05/12/1995	The Court of Criminal Appeals is affirmed by Alabama Supreme Court.
07/21/1995	Application for rehearing overruled by Alabama Supreme Court.
08/08/1995	Certificate of Judgment issued by Alabama Supreme Court.
08/08/1995	Certificate of Judgment Issued by the Court of Criminal Appeals

****

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CIRCUIT COURT OF TUSCALOOSA COUNTY
INDEX RECORD, CASE NO. CC-85-437

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ORDER 1440-1441

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PETITION FOR INQUISITION UPON
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WITH ATTACHED ORDER FOR
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VERDICT [PENALTY] 1596

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ORDER [AS TO PRISON RECORDS] 1613

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MOTION FOR NEUROLOGICAL AND NEUROPSYCHOLOGICAL EXAMS 1615

ORDER [AS TO PRISON RECORDS] 1616-1617

PETITION FOR RULE TO SHOW CAUSE 1618

ORDER [AS TO PRISON RECORDS] 1619

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APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 16, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13906-P

JAMES MCWILLIAMS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, HOLMAN CORRECTIONAL FACILITY, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

BEFORE: TJOFLAT, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

Appendix B

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 16, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13906
D.C. Docket No. 7:04-cv-02923-RDP

JAMES E. MCWILLIAMS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2015)

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

James Edmund McWilliams, Jr., an inmate on Alabama's death row, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his death sentence.

We granted McWilliams a Certificate of Appealability (COA) on four issues: (1) whether the district court erred in holding the state court was not objectively unreasonable in determining McWilliams failed to show a violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); (2) whether McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights by denying him a continuance for his sentencing hearing; (3) whether the district court erred in finding the state court was not objectively unreasonable in ruling McWilliams received effective assistance of counsel during the penalty phase of his trial and sentencing; and (4) whether the district court erred in determining the state court was not objectively unreasonable in holding McWilliams's rights under *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) were not violated.

We hold that the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's *Ake* claim, his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and his *Griffin* claim. We also hold that McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights in denying his motion for continuance. Accordingly, we affirm.

I. BACKGROUND

On December 30, 1984, McWilliams entered a convenience store in Tuscaloosa, Alabama, where Patricia Reynolds was working the nightshift by herself.

McWilliams locked the doors behind him and proceeded to rob and brutally rape Ms. Reynolds. When he was finished, he shot her with a .38 caliber handgun. Ms. Reynolds died in surgery that night.

McWilliams was arrested driving a stolen car in Ohio with the murder weapon in his possession soon afterwards. He was identified by eyewitnesses who placed him at the scene. While in jail in Ohio, McWilliams bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

In the months leading up to the murder, McWilliams was voluntarily attending mental health counseling in the form of couple's therapy with his pregnant wife at the office of Dr. Sherril Rhodes.[1] After meeting with McWilliams, Dr. Rhodes documented in a report that "there are deeper psychological problems that [McWilliams] is avoiding and hopefully the testing will reveal this." She also suspected the presence of "psychosis, or possibly manic-depressive disorder." Dr. Rhodes then set up an appointment for McWilliams to undergo psychological testing with Dr. Marci K. Davis,[2] a clinical psychologist, on October 15, 1984.

Dr. Davis administered the Minnesota Multiphasic Personality Inventory (MMPI) to McWilliams and

---

1. Dr. Rhodes's reports and notes were introduced into evidence during the Rule 32 hearing.

2. Dr. Davis's reports were entered into evidence during the penalty phase.

concluded that McWilliams's MMPI test scores "on the surface indicate that the results are invalid due to faking bad." However, on closer examination, she then determined that "[McWilliams] did tell the truth and took the test in good faith . . . [c]onsequently, we may assume that he is extremely disturbed, has much internal anxiety, and we would expect to find serious pathology." Dr. Davis also recommended McWilliams be admitted to an inpatient treatment facility, evaluated by a psychiatrist for medication, and carefully monitored by counselors. Dr. Davis ended the report by warning other counselors not to meet with McWilliams alone after dark. Nonetheless, McWilliams did not return to counseling before murdering Ms. Reynolds two and a half months later.

A. The Lunacy Commission

McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case, but the central cause for most of the speculation stems from McWilliams's tendency to malinger, or fake symptoms of his alleged mental illness.

McWilliams's counsel began investigating McWilliams's mental health less than a month after he was arrested for murdering Ms. Reynolds. On January 21, 1986, counsel petitioned the Circuit Court of Tuscaloosa County to provide a psychiatric assessment of McWilliams, including an evaluation of his sanity, his competency, and any mitigating circumstances.[3] The court granted the

3. The petition is known as a "Petition for Inquisition Upon Alleged Insane Prisoner."

petition and ordered the State of Alabama (State) to create a "Lunacy Commission" to evaluate McWilliams's mental health at the Taylor Hardin Secure Medical Facility (Taylor Hardin). The Lunacy Commission reported directly to the court.

On June 4, 1986, the Lunacy Commission presented the court with a three-and-a-half-page report summarizing the conclusions of three doctors serving on the Commission.[4] All three doctors concluded McWilliams was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms.

B. Trial and Penalty Phase

On August 27, 1986, the jury found McWilliams guilty of murder during robbery in the first degree and murder during rape in the first degree. The penalty phase took place the following day. Counsel's strategy during the penalty phase was to present McWilliams as a man who grew up with significant psychological problems that affected his behavior. Although counsel subpoenaed Dr. Rhodes to testify during the penalty phase, Dr. Rhodes did not respond to the subpoena. Ultimately, only McWilliams and his mother testified for the defense. McWilliams and his mother testified that McWilliams had head injuries as a child and a history of blacking out, hallucinating, chronic headaches, doctor visits, and memory problems. Prior to

4. Four doctors appear in the report, including Dr. Norman G. Poythress, the Director of Clinical Services at Taylor Hardin. Dr. Poythress did not summarize his own medical conclusions but did ultimately sign the report on May 27, 1986.

this testimony, counsel was unaware of these injuries and conditions.

McWilliams was permitted to read Dr. Davis's report and her MMPI test results into the record and explain his mental health issues to the jury. The court also admitted Dr. Davis's report into evidence. However, McWilliams was unable to explain any technical aspects of the report, and when cross-examined, he told the prosecutor that he was not a psychologist. The State then presented two mental health experts from the Lunacy Commission, who each testified that McWilliams was faking psychotic symptoms and was not mentally ill. The jury voted 10 to 2 in favor of the death sentence.

C. Sentencing Hearing

On September 3, 1986, counsel filed a motion requesting that McWilliams undergo neuropsychological testing for possible organic brain damage, based on the information revealed during the penalty phase about his head injuries. The court granted the request, ordering the Alabama Department of Corrections (DOC) to perform complete neurological and neuropsychological testing on McWilliams. The court further instructed the DOC to send all results and evaluations to the court no later than September 25, 1986.

On September 22, 1986, Dr. Paul Bivens, a psychologist employed by the DOC, wrote the court, explaining that he completed some of the neuropsychological testing, which indicated "possible organic impairment," but was unable

to complete all the neuropsychological tests. Instead, Dr. Bivens recommended more testing and advised the court to find a clinical neuropsychological specialist who could perform the tests independent of the DOC to "avoid unnecessary conflict."

On September 30, 1986, the trial court appointed Dr. John R. Goff, a specialist in clinical neuropsychology and the Chief of Psychology at Bryce Hospital. Dr. Goff met with McWilliams on October 3, 1986, and performed the neuropsychological testing requested by counsel. Dr. Goff's completed neuropsychological assessment was delivered to all the parties approximately 48 hours before the sentencing hearing.

Dr. Goff's report was approximately five pages long. He determined that McWilliams was suffering from organic brain dysfunction and that "organic personality disorder should be considered." His report also indicated evidence of malingering but noted it was potentially consistent with a "cry for help posture" or possibly a "fake bad." The report further explained there were some "genuine neuropsychological problems," and Dr. Goff diagnosed McWilliams with "organic personality syndrome."

Counsel subpoenaed McWilliams's medical and psychiatric records multiple times before the penalty phase and well in advance of the sentencing hearing. But, the DOC and Taylor Hardin failed to fully comply with the subpoena until the day of the sentencing hearing. The last of the medical and psychiatric records subpoenaed by counsel arrived at the court on October 8 and October 9, 1986—the morning of the 10 a.m. sentencing hearing.

At the sentencing hearing, counsel moved for a continuance to review the newly arrived records with the assistance of an expert. The court denied the request but invited counsel to review the records at the clerk's office during a brief recess. When the hearing resumed at 2 p.m., the court admitted Dr. Goff's report and all the new records into evidence. Counsel again asked for a continuance. The court again denied the request.

The court found three aggravating circumstances in support of McWilliams's death sentence: (1) McWilliams was previously convicted of a felony involving the use of violence to the person, specifically a robbery and rape he was convicted of on June 26, 1985; (2) the murder was committed during the course of a robbery and rape; and (3) the murder was especially heinous, atrocious, or cruel compared to other capital offenses in light of the brutality of the rape, the execution-type slaying, and McWilliams's behavior after the crime. The court found no mitigating circumstances.

The court determined that "the [d]efendant is not psychotic, either from organic brain dysfunction or any other reason." The court did find that "the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that does not rise to the level of a mitigating circumstance" and by "a preponderance of the evidence . . . the defendant [is] feigning, faking, and manipulative." The court then sentenced McWilliams to death by electrocution.

D. Rule 32 Evidentiary Hearing

On April 2, 1997, McWilliams challenged his conviction in a petition under Rule 32 of the Alabama Rules of Criminal Procedure, claiming that his counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase and sentencing. On June 12, 2000, the Alabama circuit court conducted a four-day evidentiary hearing. In September 2001, the Alabama circuit court denied the petition. In 2004, the Alabama Court of Criminal Appeals reviewed and affirmed the decision.

The Rule 32 evidentiary hearing on McWilliams's post-conviction claims included the testimony of defense expert Dr. George Woods and the State's rebuttal expert, Dr. Karl Kirkland. Dr. Woods reviewed the MMPI performed by Dr. Davis that McWilliams read to the jury during the penalty phase. Dr. Woods explained the test could be confused with exaggerated scores but actually indicated McWilliams had significant psychiatric and psychological problems, including paranoia and mania, as well as "abundant evidence of psychopathology." Dr. Woods agreed with Dr. Davis that McWilliams took the MMPI in good faith. Dr. Woods also examined the 1986 MMPI testing performed at Taylor Hardin, which the State used during the penalty phase. He explained that the results indicated a cry for help with severe psychopathology and did not necessarily mean McWilliams faked his symptoms.

Dr. Woods also reviewed Dr. Goff's report and testified that the results revealed symptoms of a psychiatric

disorder, but because neuropsychological impairments change over time, McWilliams's neuropsychological function was somewhat restored as of 2000. Dr. Woods further testified that he reviewed the DOC records, and the records revealed McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Dr. Woods stated that, in examining the DOC records, the administration of medication was consistent with the presentation of symptoms that required psychiatric treatment.

Dr. Woods ultimately diagnosed McWilliams with bipolar disorder, with symptoms of mania, hypomania, and depression. Dr. Woods also concluded that McWilliams was suffering from bipolar disorder on the night of the crime. Dr. Karl Kirkland, a forensic psychologist, testified that he disagreed with Dr. Woods's diagnosis. Dr. Kirkland agreed with the evaluation of the Taylor Hardin doctors that McWilliams was feigning psychiatric symptoms and that his behavior was more appropriately categorized as a character disorder.

II. PROCEDURAL HISTORY

McWilliams's conviction and death sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *See McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part, remanded in part sub nom., Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand to sub nom., McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion after remand*, 666 So. 2d 89 (Ala.

Crim. App. 1994), *aff'd sub nom., Ex part McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied sub nom., McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723, 133 L. Ed. 2d 675 (1996).

The Alabama circuit court entered its final order denying McWilliams's Rule 32 petition in September 2001, and the Alabama Court of Criminal Appeals affirmed the denial. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). On September 24, 2004, the Alabama Supreme Court denied McWilliams's petition for a writ of certiorari on his Rule 32 petition.

McWilliams then turned to the federal courts. On October 6, 2004, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. The district court assigned a magistrate judge to review McWilliams's petition and submit a recommendation. On February 1, 2008, the magistrate judge issued a report and recommendation denying all of McWilliams's claims. On August 25, 2010, the district court entered a memorandum opinion adopting the magistrate judge's conclusions. The district court further addressed specific objections McWilliams raised to the magistrate judge's report and recommendation and then entered an order dismissing McWilliams's habeas petition with prejudice and denying his application for a COA.

This court granted a COA on whether the district court improperly overruled all of McWilliams's objections to the magistrate judge's report and recommendation without specifically acknowledging certain objections.

On September 10, 2012, we vacated the district court's decision and remanded McWilliams's case to the district court with instructions to resolve all the claims in his habeas petition. The district court then entered a memorandum opinion on April 17, 2013 overruling all of McWilliams's objections to the magistrate judge's report, adopting the report in full, and denying McWilliams's habeas petition. On October 7, 2013, the district court again denied McWilliams's request for a COA.

McWilliams then filed an application for a COA in this court. On December 16, 2013, we granted McWilliams a COA.

III. STANDARD OF REVIEW

"When examining a district court's denial of a . . . habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 620 (11th Cir. 2013) (internal quotation marks omitted).

"Because [McWilliams] filed his federal petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death [Penalty] Act of 1996 (AEDPA)." *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011). When a state court has denied a claim on the merits, "the standard a petitioner must meet to obtain federal habeas relief was intended to be, and is, a difficult one." *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011)).

The "purpose of AEDPA's" amendments to § 2254 "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. __, __, 132 S. Ct. 38, 43-44, 181 L. Ed. 2d 336 (2011) (internal quotation marks omitted). Therefore, federal review of final state court decisions under § 2254 is "greatly circumscribed" and "highly deferential." *See Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (internal quotation marks omitted). AEDPA only allows federal courts to grant relief for habeas claims decided by a state court on the merits if the state court's resolution of the claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

Under AEDPA, "the state court's application of governing [F]ederal law . . . must be shown to be not only erroneous, but objectively unreasonable." *Waddington v. Sarausad*, 555 U.S. 179, 190, 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362,

410-11, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389 (2000) ("[A]n *unreasonable* application of [F]ederal law is different from an *incorrect* application of [F]ederal law."). This is a "substantially higher threshold" than when only a showing of erroneousness is required. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007). When assessing the state court's decision, we must consider the record the court had before it. *Cullen v. Pinholster*, 563 U.S. 170, 184, 131 S. Ct. 1388, 1400, 179 L. Ed. 2d 557 (2011). It is the petitioner's burden to demonstrate that the state court applied the relevant clearly established law to that record "in an objectively unreasonable manner." *See Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279 (2002) (per curiam). Given this determination is objective, a federal court may not issue a writ of habeas corpus simply because "it concludes in its independent judgment" that the state court was incorrect. *See Williams*, 529 U.S. at 409-11, 120 S. Ct. at 1522.

Our review of a petitioner's claim is further limited under § 2254(e)(1) by "a presumption of correctness [that] applies to the factual findings made by state trial and appellate courts." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (internal quotation marks omitted). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Id.* (internal quotation mark omitted). "Instead, it must conclude that the state court's findings lacked even fair support in the record." *Id.* (internal quotation mark omitted). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

IV. DISCUSSION

A. Alabama's Application of *Ake*

McWilliams contends the State deprived him of due process under *Ake* because the State did not provide him the meaningful assistance of an independent psychiatric expert at his sentencing hearing.

Under *Ake*, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. This right "extends to the sentencing phase of a criminal case." *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012) (internal quotation marks omitted). However, *Ake* cautions that a defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Rather, *Ake* entitles the defendant access to a "competent psychiatrist." *Id.* "[T]he decision on how to implement this right" is left "to the [s]tate." *Id.*

McWilliams first argues that he was denied the assistance contemplated by *Ake* because he was not provided an "expert of his own." Specifically, McWilliams asserts that he was denied such an expert because Dr. Goff's assistance was "equally disseminated to all parties." The State contends there is no clearly established Federal

law that requires it to provide a partisan mental health expert to the defense and, therefore, McWilliams is not entitled to federal habeas relief on this basis.

In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*. *See Miller v. Colson*, 694 F.3d 691, 697-99 (6th Cir. 2012) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*), *cert. denied*; *Granviel v. Lynaugh*, 881 F.2d 185, 191-92 (5th Cir. 1989) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance), *cert. denied*. Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*. *See United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."). However, the United States Supreme Court has thus far declined to resolve this disagreement among the circuits. *See Miller*, 694 F.3d at 697 n. 6; *Granviel v. Texas*, 495 U.S. 963, 110 S. Ct. 2577, 109 L. Ed. 2d 758 (1990) (denying certiorari). As a result, the State's provision of a neutral psychologist would not be "contrary to, or involve[] an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1). Therefore, McWilliams's argument fails.

McWilliams next contends that Dr. Goff's late arrival to the proceedings denied him due process under *Ake*. The

State asserts a defendant is only entitled to assistance from a psychiatrist under *Ake* and the trial court's appointment of Dr. Goff satisfied this requirement.

McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Even assuming an *Ake* error occurred, relief may only be granted if the error had a "substantial and injurious effect or influence" on the outcome of McWilliams's

case. *See Hicks v. Head*, 333 F.3d 1280, 1286-87 (11th Cir. 2003) (internal quotation marks omitted). The jury at McWilliams's penalty phase voted 10 to 2 in favor of the death penalty. The trial judge reviewed Dr. Goff's report and took into account the possibility of organic brain damage but also noted that, throughout McWilliams's medical records, different psychologists and psychiatrists describe him as a malingerer. For example, the mental health professionals on the Lunacy Commission determined McWilliams was a malingerer and a faker; Dr. Goff's report indicated that McWilliams was malingering on some level; Dr. Kirkland determined McWilliams was faking symptoms; and even Dr. Woods, McWilliams's post-conviction expert admitted McWilliams has a history of malingering and can be deceitful and manipulative. Moreover, Dr. Woods was the only doctor who diagnosed McWilliams as bipolar—a diagnosis contested by Dr. Kirkland. Based on a review of this and other evidence, the trial judge found that McWilliams's "aggravating circumstances overwhelmingly outweighed the mitigating circumstances."

A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime. Accordingly, even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence.

B. Procedural Default

McWilliams argued to the district court that he was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused his motion for continuance of the sentencing hearing. However, the magistrate judge determined McWilliams did not properly raise this claim before the Alabama Supreme Court and, in turn, McWilliams failed to exhaust his state remedies. Therefore, the district court determined this claim is procedurally barred.

When a habeas claim arises in state court, the petitioner must exhaust his state remedies. 28 U.S.C. § 2254(b)(1)(A). In order to satisfy the exhaustion requirement, a petitioner must "fairly presen[t] federal claims to the state courts in order to give the [s]tate the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865 (1995) (per curiam) (internal quotation marks omitted). The petitioner must apprise the state court of "the federal constitutional issue," not just the underlying facts of the claim or a "somewhat similar state-law claim." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (internal quotation marks omitted). The Supreme Court has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10, 112 S. Ct. 1715, 1720, 118 L. Ed. 2d 318 (1992). The Court further explained:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere

> statement of a federal claim in state court. Just as the [s]tate must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the [s]tate a full and fair opportunity to address and resolve the claim on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n. 25 (11th Cir. 2003).

McWilliams first raised his ineffective assistance of counsel claim based on the motion for continuance in his direct appeal to the Alabama Court of Criminal Appeals. The court denied this claim because McWilliams "demonstrated no prejudice." *McWilliams v. State*, 640 So. 2d 982, 993 (Ala. Crim. App. 1991). McWilliams then petitioned the Alabama Supreme Court for a writ of certiorari. In his petition, McWilliams asserted: (1) his rights were violated "under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and (2) the Alabama Court of Criminal Appeals erred by holding he had not demonstrated prejudice. The Alabama Supreme Court declined to review the petition.

McWilliams only mentioned his motion for continuance in Sections VIII and IX of his brief to the Alabama Supreme Court. But, he failed to argue in either of those Sections that the denial of the motion violated his right to effective assistance of counsel. Although Section VIII asserted the trial court abused its discretion in denying McWilliams's motion for continuance, McWilliams did not

allege the denial violated his right to effective assistance of counsel, and he did not mention the phrase "effective assistance of counsel" or cite *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). McWilliams also did not mention *Strickland* or use the phrase "effective assistance of counsel" in Section IX of the brief.

Accordingly, McWilliams did not apprise the state court of his constitutional claim regarding his motion for continuance of the sentencing hearing. The district court did not err in concluding McWilliams's ineffective assistance of counsel claim is procedurally barred.

C. Ineffective Assistance of Counsel During the Penalty Phase of Trial and Sentencing

McWilliams also claims counsel was ineffective for failing to investigate or present mitigating evidence during the penalty phase of his trial and sentencing.

The district court's denial of McWilliams's habeas corpus petition on this issue is reviewed de novo. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

As with McWilliams's *Ake* claim, we may only grant habeas relief on this issue if the State's resolution of the Rule 32 proceedings and subsequent appeals resulted in a decision that was either (1) "contrary to or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court

proceedings." 28 U.S.C. § 2254(d). Therefore, in contrast to our review of a *Strickland* claim on direct appeal from a federal district court, we must defer to the state court unless its application of *Strickland* was unreasonable. *See Richter*, 562 U.S. at 101, 131 S. Ct. at 785. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 786 (internal quotation marks omitted). Furthermore, as discussed above, we must presume the state court's factual findings to be correct unless the petitioner rebuts this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"The object of an ineffectiveness claim is not to grade counsel's performance." *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069; *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). The issue is "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987) (internal quotation marks omitted).

To establish that his counsel provided constitutionally ineffective assistance, McWilliams must show both that "counsel's performance was deficient" and that the deficiency "prejudiced [his] defense." *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance is representation that falls "below an objective standard of reasonableness" measured by "prevailing professional

norms." *See id.* at 687-88, 104 S. Ct. at 2064-65. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. Thus, "to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take.*" *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001).

Given the strong presumption of reasonableness under *Strickland* and the requirements of AEDPA, our review of counsel's performance is "doubly deferential." *See Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). McWilliams's claim cannot succeed unless he provides affirmative evidence of ineffectiveness—an "absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. __, __,134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) (internal quotation marks omitted).

McWilliams asserts counsel was ineffective because counsel failed to investigate and present evidence of McWilliams's family history and mental health. According to McWilliams, the mitigation evidence presented at his post-conviction hearings shows the evidence counsel offered during trial and sentencing was deficient. But, the Alabama Court of Criminal Appeals determined that counsel diligently investigated and presented evidence about McWilliams's family history and mental health, and this conclusion does not unreasonably contravene clearly established Federal law.

First, counsel spoke to McWilliams's mother, father, and wife about McWilliams's family history. Counsel also telephoned McWilliams's friends. Counsel testified at the Rule 32 evidentiary hearing that he would have investigated any other potentially useful sources of information or individuals mentioned to him as possible mitigation witnesses. Moreover, McWilliams's mother and McWilliams testified extensively about his childhood during the penalty phase.

Second, counsel: (1) requested that McWilliams be evaluated by the Lunacy Commission; (2) retrieved McWilliams's medical records, despite the DOC and Taylor Hardin ignoring his subpoenas; (3) obtained the assistance of a volunteer psychologist, (4) arranged for McWilliams to be evaluated by Dr. Goff, and (5) subpoenaed McWilliams's previous psychologist to testify during the penalty phase. Although the subpoenaed psychologist did not respond to the subpoena, counsel testified at the Rule 32 hearing that he made a strategic decision not to enforce the subpoena because forcing a doctor into court could backfire. Furthermore, although counsel did not learn of the head injuries McWilliams sustained as a child until the penalty phase of trial, the Lunacy Commission reported no evidence of a brain injury. Therefore, it was reasonable for counsel to conclude that McWilliams had no such injuries. Nevertheless, once counsel learned of the head injuries, he immediately moved for and obtained a neuropsychological report prior to the sentencing hearing. At the hearing, the report was admitted into evidence.

In undertaking such efforts, counsel's investigation of McWilliams's family history and mental health was

reasonable. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1241-43 (11th Cir. 2010) (finding that counsel performed an adequate mitigation investigation where he gathered medical records and assisted with the development of an expert evaluation report). In addition, given McWilliams's questionable mental health history and the limited value of his family background information, it cannot be found that "no competent counsel" would have adopted the same approach as counsel. *See Grayson*, 257 F.3d at 1216. While counsel may have been able to present more mitigation evidence, this alone does not render his decision not to do so unreasonable. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

On this record, McWilliams has not met his AEDPA burden. He has not shown that counsel's performance was so deficient as to overcome the "doubly deferential" standard required for relief. *See Knowles*, 556 U.S. at 123, 129 S. Ct. at 1420. We therefore reject McWilliams's claim of ineffective assistance of counsel.

D. Prosecutorial Misconduct

Finally, McWilliams alleges the prosecutor's comments during closing argument on his failure to testify at trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. McWilliams contends these statements denied him a fair trial because they constituted improper burden-shifting arguments.

McWilliams's claim of prosecutorial misconduct involves mixed questions of law and fact and, therefore, is reviewed de novo. *See United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997).

The Fifth and Fourteenth Amendments "forbid[] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin*, 380 U.S. at 615, 85 S. Ct. at 1233. However, "a prosecutor's indirect reference to a defendant's failure to testify is not reversible error per se." *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995). This court has "strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence." *Isaacs v. Head*, 300 F.3d 1232, 1270 (11th Cir. 2002). "A comment on the failure of the *defense*, as opposed to that of the *defendant*, to counter or explain the testimony presented or evidence introduced is not [improper burden-shifting]." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983) (per curiam).

Appendix C

Prosecutorial misconduct during closing argument, including an inappropriate burden-shifting argument, only warrants a new trial if the remarks were "improper" and "prejudicially affect[ed]" the defendant's "substantial rights." *See United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal quotation marks omitted), *aff'd*, 37 F. App'x 978 (11th Cir. 2002). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *Id.* (alterations in original) (internal quotation marks omitted).

McWilliams challenges the following comment made by the prosecution:

> You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it.

Appendix C

Ex parte McWilliams, 640 So. 2d 1015, 1018-19 (Ala. 1993).

The Alabama Court of Criminal Appeals found that the prosecutor's comment was not "intended to be a reference to [McWilliams's] silence." *McWilliams*, 640 So. 2d at 1010. Furthermore, the Alabama Supreme Court determined that "[t]his is clearly a comment on the failure of *defense counsel* to explain testimony or evidence." *Ex parte McWilliams*, 640 So. 2d at 1019-20. The prosecutor began his comment by telling the jury he was referring to what the *defense attorneys* did not talk about "in the *evidence*." While the statement, "[t]here is no good reason, explanation that indicates anything other than guilt in this case," by itself could be taken to mean the defendant did not provide an explanation himself, the prosecutor followed the comment by stating that "the evidence doesn't show any other explanation for it." In light of the entire statement, it is clear that the prosecutor intended the statement to be directed at counsel, and the comment naturally and necessarily related to counsel's arguments regarding the evidence introduced at trial, not McWilliams's constitutionally protected silence.

Accordingly, McWilliams has failed to show the state court's "was contrary to or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *See* 28 U.S.C. § 2254(d).

V. CONCLUSION

For the foregoing reasons, we find as follows. First, the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's (1) *Ake* claim, (2) his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and (3) his claim that the prosecutor improperly commented on his failure to testify. Second, McWilliams's ineffective assistance of counsel claim based on the trial court's denial of his motion for continuance of the sentencing hearing is procedurally defaulted. Therefore, we affirm the district court's denial of McWilliams's petition for a writ of habeas corpus.

AFFIRMED.

Appendix C

JORDAN, Circuit Judge, concurring.

I concur in the judgment denying federal habeas corpus relief to Mr. McWilliams. My reasons are as follows.

• The ineffective assistance of counsel claim based on the denial of the continuance of the sentencing hearing was not exhausted under 28 U.S.C. § 2254(b)(1) because Mr. McWilliams did not present it in his petition for discretionary review to the Alabama Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).

• The ineffective assistance of counsel claim related to the investigation and presentation of mitigating evidence at the penalty phase fails because counsel conducted a competent mental health investigation; had Mr. McWilliams evaluated not once, but twice; and presented mitigating evidence (including Dr. Goff's report) at the sentencing hearing. *See Bobby v. Van Hook*, 558 U.S. 4, 9-12, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009).

• The claim based on a violation of *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), is a close one, as shown by the fact that two judges on the Alabama Court of Criminal Appeals sided with Mr. McWilliams. See *McWilliams v. State*, 640 So.2d 982, 1014 (Ala. Cr. App. 1991) (Bowen, J., dissenting in part). But given AEDPA deference, the finding by the Court of Criminal Appeals that the prosecutor's argument was not a comment on Mr. McWilliams' right to remain silent was a reasonable application of *Griffin*.

• The claim based on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), is also close, for the reasons outlined in Judge Wilson's dissent. At the end of the day, however, I think the claim fails. First, the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert. As a result, I cannot say that the Court of Criminal Appeals unreasonably applied, or ruled in a way that was contrary to, *Ake*. *See Woods v. Donald*, 135 S. Ct. 1372, 1377, 191 L. Ed. 2d 464 (2015). Second, I do not think Mr. McWilliams has shown a "substantial and injurious effect" from any *Ake* violation. *See Fry v. Pliler*, 551 U.S. 112, 119-20, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007). I reach this conclusion in part because Mr. McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing. Given this void in the record, it is difficult for me to conclude that Mr. McWilliams has met his burden on prejudice, as we do not know how additional time with Dr. Goff (and his report) would have benefited the defense. My point is not that a capital defendant must always present the testimony of his medical expert at a post-conviction hearing to prove prejudice under *Ake*. It is, instead, that in this case Dr. Goff's absence is one of the reasons that Mr. McWilliams cannot show a "substantial and injurious effect."

Appendix C

WILSON, Circuit Judge, dissenting:

Defendants facing the death penalty—the "gravest sentence our society may impose"—must have "a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. __, __, 134 S. Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). This means that they must receive "meaningful access to justice" during their capital proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S. Ct. 1087, 1092-1093, 84 L. Ed, 2d 53 (1985). In *Ake*, the Supreme Court held that this guarantee requires states to provide defendants meaningful "access to a psychiatrist[ ]" when their mental health "is likely to be a significant factor" at trial or sentencing. *See id.* at 74-77, 105 S. Ct. at 1091-1093. James Edmund McWilliams, Jr. was denied this basic right.

McWilliams's mitigation case depended on the judge and jury's conclusions about his mental health. Nonetheless, McWilliams did not receive any expert assistance during his sentencing before the jury. And, at his judicial sentencing hearing, he again was denied assistance, absent an expert report provided hours beforehand from a mental health expert who did not have the opportunity to review his full psychiatric history. This was not meaningful assistance. For these reasons, Alabama's resolution of McWilliams's *Ake* claim was "an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would reverse the district court's denial of McWilliams's habeas petition with directions to remand the case to state court for a new sentencing hearing.

Appendix C

I.

The penalty phase of McWilliams's trial began on August 28, 1986. On that date, a sentencing hearing was held before the jury. Although McWilliams received psychological services in the months leading up to the murder of Patricia Reynolds and his mental health history formed the basis of his mitigation case, the trial court did not provide him access to a psychiatrist during this phase. Moreover, defense counsel subpoenaed Dr. Sherril Rhodes to testify at the hearing, but Dr. Rhodes did not appear. Ultimately, McWilliams and his mother were the only witnesses for the defense during the penalty phase. Meanwhile, the State proffered multiple expert psychiatric witnesses.

McWilliams's judicial sentencing hearing was scheduled for October 9, 1986. On September 30, 1986, the trial court appointed a clinical neuropsychologist, Dr. John R. Goff—a state employee—to examine McWilliams and generate a report. Dr. Goff provided his report to both the prosecution and defense on October 7, 1986. The report stated that McWilliams's "neuropsychological assessment [wa]s reflective of organic brain dysfunction which is localized to the right cerebral hemisphere." It also found there was evidence of "cortical dysfunction attributable to the right cerebral hemisphere dysfunction." The report concluded that "in light of [McWilliams's] obvious neuropsychological deficit, organic personality syndrome should be considered." The next day, on October 8, the court advised defense counsel that it had just received McWilliams's medical and psychiatric Department of Corrections (DOC) records, which counsel had subpoenaed multiple times. However, various records

remained missing. The DOC produced more records on October 9—the day of the sentencing hearing.

Faced with less than 48 hours to review this new information and consider its usefulness, defense counsel sought more time to secure the services of an expert to assist him in evaluating the records. Counsel stated to the court:

> [G]iven the nature of this case . . . it is necessary on my part to have someone else review these findings. . . . [W]e are unable to present anything because of the shortness of time between which this material was supplied to us and the date of the hearing. . . . It is the position of the Defense that we received these records at such a late date, such a late time that it has put us in a position as layman, with regard to psychological matters, that we cannot adequately make a determination as to what to present to The [sic] Court with regards to the particular deficiencies that the Defendant has. . . . [W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

Nevertheless, the court denied the Motion for Continuance.

This sequence of events does not constitute the meaningful access to a mental health expert contemplated by *Ake*.

II.

A. An Unreasonable Application of *Ake*

Ake is unequivocal: due process requires states to provide a defendant the access to a psychiatrist necessary to assure him "a fair opportunity to present his defense" and the ability "to participate meaningfully in [his] judicial proceeding[s]." *See Ake*, 470 U.S. at 76-77, 83-84, 105 S. Ct. at 1092-93, 1096-97; *Medina v. California*, 505 U.S. 437, 444-45, 112 S. Ct. 2572, 2577, 120 L. Ed. 2d 353 (1992) ("The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him a fair opportunity to present his defense and to participate meaningfully in the judicial proceeding." (internal quotation marks omitted)). Accordingly, "[t]he [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense*." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096 (emphasis added). This requirement applies to any trial or sentencing proceedings in which the defendant's mental health will be a significant factor.[1] *See id.* at 83-84,

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1. Here, it was clear that McWilliams's mental health was a significant factor in his sentencing proceedings, including both the penalty phase and judicial sentencing hearing. There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing. Moreover, at the penalty phase, the trial court was aware of the substantial role that McWilliams's mental health was to play in his case for mitigation—the defense informed the court that it subpoenaed a mental health

105 S. Ct. at 1096-97; *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012).

Providing further insight into the type of assistance compelled by *Ake*, the *Ake* Court explained the role of the psychiatrist in this context as: (1) gathering facts—through an examination, interviews, and elsewhere—to share with the judge and jury; (2) analyzing the information gathered and rendering conclusions about the defendant's mental condition; (3) assisting the defendant with identifying the probative questions to ask of the prosecution's psychiatrists; (4) assisting the defendant with understanding the opinions proffered by the other party's psychiatrists; and (5) helping lay jurors make a sensible and educated determination about the defendant's mental condition. *See Ake*, 470 U.S. at 80-81, 105 S. Ct. at 1095.

Thus, *Ake* does not simply entitle a criminal defendant to expert assistance; the assistance must be meaningful. McWilliams was denied this right during both the penalty phase and judicial sentencing hearing.

1. As with the Defendant in *Ake*, McWilliams Was Not Provided Any Psychiatric Assistance When He Appeared Before the Jury for Sentencing.

The facts surrounding McWilliams's penalty phase hearing mirror those that resulted in a denial of due

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expert to testify at the penalty phase hearing, and at the hearing, the State offered expert psychiatric testimony, and McWilliams's mother testified about McWilliams's childhood head trauma.

process in *Ake*. After the defendant in *Ake* was found guilty, he appeared before the jury for sentencing. During this proceeding, the prosecution relied on testimony from state psychiatrists who examined the defendant, but the defendant had "no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment." *Id.* at 73, 105 S. Ct. at 1091. The Court held that the defendant was denied due process as a result of the state's failure to provide him access to a psychiatrist at the proceeding. *Id.* at 86-87, 105 S. Ct. at 1098. Likewise, McWilliams appeared before the jury for sentencing—his "penalty phase" hearing—after his verdict was rendered, and the trial court did not provide him any access to a psychiatrist, leaving him with no means to rebut the State's expert testimony. Therefore, as in *Ake*, McWilliams was denied due process when he appeared before the jury for sentencing.

2. The Trial Court Failed to Provide McWilliams Meaningful Assistance at the Judicial Sentencing Hearing.

The trial court's failure during the penalty phase could have been remedied through the provision of meaningful expert assistance for the judicial sentencing hearing. But, the trial court did not provide McWilliams such assistance, thereby denying him due process.

First, Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*. This court has previously explained that a psychiatric examination

must be done "at such a time to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). Dr. Goff was unable to provide assistance to the defense until less than 48 hours before the judicial sentencing hearing—when his report and findings were finally completed. This was an inadequate amount of time for Dr. Goff to educate defense counsel on the report, assist counsel in developing a strategy and testimony for the hearing, and/or help counsel understand and respond to the testimony put forth by the State's expert witnesses at the penalty phase. *See Ake*, 470 U.S. at 80-81, 105 S. Ct. at 1095. In light of the technical nature of the report and McWilliams's complex mental health history, the defense did not even have enough time to achieve the basic level of understanding of the report needed to use it at the hearing. Moreover, in the hours leading up to the hearing, defense counsel had to determine how the newly provided DOC records related to the report's findings. Thus, any assistance received from Dr. Goff's report was superficial and far from meaningful.

Second, Dr. Goff could not provide competent assistance because he did not have the benefit of reviewing critical mental health records. Despite defense counsel's multiple requests to the DOC, the DOC did not produce McWilliams's mental health records until hours before the sentencing hearing—after Dr. Goff's report was completed. These records showed, *inter alia*, that McWilliams was medicated with antipsychotics and antidepressants while incarcerated. Without access to these highly relevant records, Dr. Goff could not have

provided a meaningful analysis.[2] *See Blake*, 758 F.2d at 532-33 (finding the defendant was denied due process because the state did not produce records relevant to his expert psychiatrist's testimony until the day before trial); *Starr v. Lockhart*, 23 F.3d 1280, 1288-89 (8th Cir. 1994) (holding that the defendant was denied due process under *Ake* where the psychiatrist was merely "[un]able to interpret or explain" relevant information, including the results of past mental health examinations).

Third, in order to obtain meaningful assistance from a psychiatrist, the defense must be able to speak freely with the psychiatrist about its case, without the prosecution's access to the discussion. As McWilliams points out in his brief, *Ake* is not satisfied by an expert "who would provide . . . assistance to the defendant, only to cross the aisle and disclose to the State the future cross-examination of defense counsel." However, as a neutral expert, Dr. Goff was free to make such a disclosure.

Relatedly, *Ake* requires that a defendant receive an opportunity—through an independent psychiatrist—to "develop[] his *own* psychiatric evidence to rebut the [State's] evidence and to enhance his defense in mitigation." *Tuggle v. Netherland*, 516 U.S. 10, 13, 116 S. Ct. 283, 285,

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2. Additionally, under these circumstances—where the factfinder is deprived of expert testimony on parts of the defendant's psychiatric history—the factfinder "loses the substantial benefit of potentially probative information," resulting in "a much greater likelihood of an erroneous decision." *See Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 2604, 91 L. Ed. 2d 335(1986) (plurality opinion) (discussing the application of *Ake*).

133 L. Ed. 2d 251 (1995) (per curiam) (emphasis added). In addition to being a state employee with the ability to speak to the prosecution about his report and the defense's case, Dr. Goff provided his report to the defense and prosecution at the same time. Clearly, the report did not serve as McWilliams's "own psychiatric evidence."[3]

In sum, far from simply being denied the chance to choose his own psychiatrist or receive funds to hire his own psychiatrist, McWilliams was deprived of basic access to a psychiatrist. Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing

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3. Indeed, we previously stated that "[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (internal quotation marks omitted). Furthermore, the Majority opinion puts us at odds with our sister circuits on this issue. *See Starr*, 23 F.3d at 1287-88, 1290-91, 1294 (examining the relationship between *Ake* and *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953) and reversing where the defendant was provided a "neutral" state examiner); *Smith v. McCormick*, 914 F.2d 1153, 1157-58 (9th Cir. 1990) (holding that *Ake* requires the provision of a non-neutral psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process. *See Simmons v. South Carolina*, 512 U.S. 154, 164-65, 114 S. Ct. 2187, 2194, 129 L. Ed. 2d 133 (1994) (plurality opinion) (citing *Ake*, 470 U.S. at 83-87, 105 S. Ct. at 1096-98) (holding that defendant was denied due process where he was "prevented from rebutting information that the sentencing authority considered"). Given these circumstances, the state court's application of *Ake* was unreasonable.[4]

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4. The concurring opinion states that the Supreme Court has not addressed whether *Ake* is satisfied by the appointment of a neutral psychiatrist and, therefore, the state court did not unreasonably apply *Ake*. This focus on the "neutral expert" issue misses the point. Assuming for the sake of argument that a state's failure to provide a defendant access to his own psychiatrist is not contrary to *Ake*, the state court's decision is still an unreasonable application of *Ake*. As noted above, *Ake* plainly holds that when a defendant's mental health is a significant factor at trial or sentencing, due process requires that the defendant receive access to a psychiatrist who can competently "assist in [the] evaluation, preparation, and presentation of [his] defense." *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Regardless of the "neutral expert" issue, Dr. Goff was unable to assist defense counsel with the preparation and presentation of the defense because he did not finish his report until hours before the sentencing hearing and did not have access to pivotal mental health records. Solely considering these deficiencies, it is clear that McWilliams was denied "the assistance of a psychiatrist for the *development* of his defense." *See Simmons*, 512 U.S. at 165, 114 S. Ct. at 2194 (emphasis added) (summarizing the holding in *Ake*). Said another way, the concurring opinion's focus on the "neutral expert" issue misses the broader controlling issue: whether McWilliams received access to meaningful expert assistance.

B. A Substantial and Injurious Effect

We are required to grant habeas relief for an "*Ake* error" if the error had a "substantial and injurious effect" on the trial or sentencing. *See Hicks v. Head*, 333 F.3d 1280, 1286 (11th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353 (1993)) (internal quotation marks omitted). Alabama's *Ake* error had this effect on McWilliams's death sentence, as it precluded McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the State.

At the penalty phase of his trial, McWilliams had no opportunity to respond to testimony provided by the State's expert psychiatrists opining that McWilliams was a malingerer who "faked" mental illness. He was reduced to reading to the judge and jury a technical psychiatric report that indicated he was potentially psychopathic, but the information was virtually useless in the absence of an expert who could explain the report and answer the State's questions. At the judicial sentencing hearing, McWilliams was again denied the assistance he required to respond to the State's expert testimony. Hence, as a result of the trial court's error, a convicted murderer had to testify about his own mental health, was called a liar by State experts, and then was prevented from showing otherwise.

Testimony from McWilliams's state post-conviction hearing shows that, with appropriate assistance, he would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the

post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a "cry-for-help." He then explained the difference between a "fake-bad" and a "cry-for-help" diagnosis; the former is "someone attempting to make themselves look worse," and the latter, while seemingly "very similar" to the former, actually reflects "significant psychiatric and psychological problems." Dr. Woods further contradicted the State's experts by concluding McWilliams was suffering from bipolar disorder the night of the crime. Dr. Woods's findings relied on, *inter alia*, records from the DOC showing McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Due to the trial court's failures, McWilliams was wholly unable to present this or similar evidence during sentencing.

Despite this powerful evidence, the concurring opinion finds that McWilliams has not shown a substantial and injurious effect "in part because . . . [he] did not present Dr. Goff as a witness at the state post-conviction hearing[,]" and therefore, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." *See* Concurring Op. at 32. But, this argument is belied by Dr. Woods's testimony, which shows that McWilliams would have presented "different," significantly "more viable" mental health evidence during sentencing if he was afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense. *See Hicks*, 333 F.3d at 1287.

Furthermore, when considering whether a defendant was prejudiced by a constitutional error that affected

his presentation of mitigation evidence, we are required to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweigh[] it against the evidence in aggravation." *See Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52, 110 S. Ct. 1441, 1449-50, 108 L. Ed. 2d 725 (1990)); *Hicks*, 333 F.3d at 1286-87 (weighing the mitigation evidence presented during trial and habeas proceedings in considering whether an *Ake* error had a substantial and injurious effect). In other words, we must consider the evidence *before us*. Nonetheless, my concurring colleague is dissuaded, in part, because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." Concurring Op. at 32. In light of the relevant precedent, I am inclined, however, to weigh the evidence in the record, rather than opine about the value of hypothetical evidence not in the record. *See Williams*, 529 U.S. at 397-98, 120 S. Ct. at 1515.

After weighing the available evidence, we are required to ask ourselves: "does a grave doubt exist as to whether" the *Ake* error "substantially influence[d]" McWilliams's sentence? *See Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam). To me, the answer to this question is clear. McWilliams has shown that but-for the trial court's *Ake* error, the court would have been faced with a starkly different record. McWilliams has put forth evidence contesting the Lunacy Commission, showing he was not malingering, and demonstrating that he suffered from a major mental illness at the time of the

crime. Therefore, I cannot find that the *Ake* error did not substantially influence McWilliams's sentence.

III.

Because the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect, I dissent. To remedy the error, I would reverse the district court's denial of the petition for a writ of habeas corpus so that the matter can be remanded to the state court for a new sentencing hearing.

APPENDIX D — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION, FILED FEBRUARY 1, 2008

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

CV-04-RDP-RRA-2923-W

JAMES E. McWILLIAMS,

Petitioner,

v.

DONAL CAMPBELL, COMMISSIONER
OF THE ALABAMA DEPARTMENT OF
CORRECTIONS, *et al.*,

Respondents.

February 1, 2008, Decided
February 1, 2008, Filed

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This action seeks habeas corpus relief with respect to petitioner James E. McWilliams' state court conviction and death sentence on a charge of capital murder. (*See* 28 U.S.C. § 2254).

Appendix D

(TABLES INTENTIONALLY OMITTED)

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Claim X. James McWilliams' Due Process Right to the Assistance of a Partisan Psychiatrist Was Violated During Both Penalty Phases of the Trial.

The Alabama Supreme Court made the following statements concerning this claim:

The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor-Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical

paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor-Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms suggestive of head injury when he was at Taylor-Hardin.

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument

and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.'" The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an expert to testify. The State argues that when the appellant read into evidence the

psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). FN1.

> FN1. In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense

> counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

The United States Supreme Court distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.
>
> 'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' [*Estelle v. Smith*], at 465 [101 S. Ct. at 1874].

> We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' Id., at 468 [101 S. Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, 483 U.S. at 422, 107 S. Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, 483 U.S. at 425, 107 S. Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present

case makes the same argument. The United States Supreme Court replied to this argument, stating:

> Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion. . . . Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about the defendant's mental condition, . . ., will be undermined by a decision in favor of the Commonwealth.
>
> While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required . . . and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in Smith that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' [*Estelle v. Smith*,] 451 U.S., at 468 [101 S. Ct. at 1875]. Thus, where a defendant does not make

> an issue of his mental condition, we fail to see how the decision today will undermine *Pate [v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal.

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S. Ct. at 2919, fn. 21.

The holding in *Ake v. Oklahoma*, supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the present case, the appellant was provided with psychiatric assistance; thus the principle of Ake was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no

indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

McWilliams makes the following argument in support of this claim:

When counsel requested the appointment of a psychiatrist to assist the defense, the court appointed a neutral expert and made his work product available to the prosecution, as well as the defense, in blatant violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The prosecution used the fruits of the psychiatric examination that counsel initiated to obtain a jury recommendation of death.

Defense counsel demonstrated a need for additional assistance from a psychiatrist to prepare for the sentencing hearing. The court ordered a further psychiatric evaluation, but it refused to provide counsel with access to an expert to "assist in evaluation, preparation and presentation" of his case. *Ake v. Oklahoma*, 470 U.S. at 83. The accuracy of the sentencing hearing was seriously damaged by this violation of due process. The second

evaluation produced significant mitigating evidence of organic brain damage, but counsel did not understand the expert's report. Because he was unable to explain it to the court, the court mistakenly found that it did not establish a mitigating circumstance.

Ake Violations During Jury Recommendation of Sentencing

In the landmark case of Ake v. Oklahoma, the Supreme Court held that due process sometimes requires the appointment of a psychiatrist to assist an indigent defendant and his lawyer in a capital sentencing trial. 470 U.S. at 83. A defendant is entitled to this assistance when he makes "a preliminary showing" that his mental condition "is likely to be a significant factor at trial." 470 U.S. at 74.

In the present case, defense counsel made a sufficient showing of need to trigger James McWilliams' due process right to the assistance of a psychiatrist in the penalty phase of the trial when he advised the court that appellant was receiving psychotropic medication and behaving erratically. *See, e.g., Ake v. Oklahoma*, 470 U.S. at 71. In an effort to comply with *Ake v. Oklahoma*, the court ordered a psychiatric examination of appellant at Taylor Hardin Secure Medical Facility, but the results of the examination were disclosed to the prosecution, as well as the defense. The defense elected not to use any part of the Taylor Hardin evaluation during the jury trial on the issue of punishment, but the prosecution still used the testimony of the experts who evaluated James at Taylor Hardin.

Appendix D

While James McWilliams did not have a "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own" expert, he was entitled to the assistance of a partisan psychiatrist selected for him by the court. *Ake v. Oklahoma*, 470 U.S. at 83. Due process can be satisfied by providing the defendant with the assistance of a partisan psychiatrist at a state hospital, such as Taylor Hardin. *See, e.g., Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986); *Garrison v. State*, 520 So.2d 219, 221 (Ala. 1987). The examination of the defendant by "neutral psychiatrists" at a state hospital was *not* sufficient. *Ake v. Oklahoma*, 470 U.S. at 85.

The defense psychiatrist's evaluation of James McWilliams should have been covered by the attorney-client privilege, unless the defense called the expert as a witness or presented his report in evidence. *Miller v. District Court, City & County of Denver*, 737 P.2d 834, 836-37 (Colo. 1987) (and cases cited therein); *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1980). Disclosure of the Taylor Hardin evaluation to the prosecution was as unacceptable as compelling defense counsel to turn over his notes of his interview with the defendant. *Id.*

Defense counsel did not waive the confidentiality of the Taylor Hardin evaluation by presenting lay testimony about appellant's mental condition. *Miller v. District Court*, 737 P.2d at 838 (and cases cited therein). A waiver based solely on the presentation of lay testimony to prove a mental status defense "would chill the defendant's dialogue" with the defense psychiatrist and frustrate the policy underlying the attorney-client privilege. *Id.* at 839 (*citing Ake v. Oklahoma*).

The jury's recommendation of death must be reversed, although defense counsel did not object to the disclosure of the Taylor Hardin evaluation to the prosecution or the testimony of the Taylor Hardin experts. In a capital case, "the 'plain error' doctrine, as enunciated in rule 45A," requires a decision on the merits of any error that adversely affected a substantial right of the defendant. *Ex Parte Johnson*, 507 So.2d 1351, 1356 (Ala. 1986). James' due process right to the assistance of partisan dense psychiatrist was completely eviscerated when the prosecution used the psychiatrist's privileged work product to obtain a recommendation of death from the jury.

Ake Violation During Sentencing by the Court

A further violation of *Ake v. Oklahoma* occurred during the sentencing hearing that the court conducted. After the jury recommended the death penalty, defense counsel requested the assistance of an expert to determine whether appellant had organic brain damage. Counsel made the necessary "threshold showing to the trial court," *Ake v. Oklahoma*, 470 U.S. at 83, by alleging that James sustained two head injuries and received psychiatric treatment in prison. The court ordered a complete neuropsychological examination of appellant, but it did not provide all of the assistance that was required to give him "[m]eaningful access to justice." *Ake v. Oklahoma*, 470 U.S. at 77.

When an indigent defendant demonstrates to the trial court that his mental condition is likely to be a significant

factor in his capital sentencing trial, as James McWilliams did, "the State must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation and presentation of the defense.*" *Ake v. Oklahoma*, 470 U.S. at 83 (emphasis added). The court ordered an appropriate examination, but it refused to give counsel access to an expert to assist him in preparing and presenting his case.

Dr. John Goff was hired by the state to perform the neuropsychological examination that the court ordered to assist the defense. The neuropsychological tests were so difficult to interpret that they presented a "diagnostic dilemma" to Dr. Goff. Defense counsel received Dr. Goff's written report less than two days before the sentencing hearing. He did not understand it, but he sensed that it was sufficiently favorable to merit further investigation. Counsel advised the court that he lacked the expertise to interpret the highly technical report. He explained that Dr. Goff's findings appeared to conflict with the findings of the Taylor Hardin experts. Counsel literally begged the court for an opportunity to consult with an expert who could explain the report to him. The court refused to allow this.

Dr. Goff's report was placed in evidence without explanation, because James had "no expert witness" to "introduce on his behalf evidence in mitigation of his punishment." *Ake v. Oklahoma*, 470 U.S. at 73. The report was useless without the testimony of a defense expert to explain it. Compare *Magwood v. Smith*, 791 F.2d at 1443

(no *Ake* violation because "three experts gave testimony highly favorable" to defense about their findings). Defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of sophisticated neuropsychological tests that Dr. Goff administered. *Ake v. Oklahoma*, 470 U.S. at 83.

The "potential accuracy" of the sentencing verdict would have been "dramatically enhanced" if counsel had the assistance of an expert to help him "translate a medical diagnosis into language" that the court would have understood *Ake v. Oklahoma*, 470 U.S. at 81, 83. When a person sustains a serious head injury, as appellant did on two occasions, and his brain is damaged in the manner that Dr. Goff described in his report, he is likely to undergo "a marked change in personality." Kaplan and Sadock, *Comprehensive Textbook of Psychiatry*, 548, 489, 877 (4th Ed. 1985). Through no fault of his own, he will begin to engage in violent conduct. *Id.* at 964; *accord* R. Slovenko, *Psychiatry and Law*, 400 (1973). If the defense had been able to prove with expert testimony that appellant was "less able than a normal adult to control his impulses" because his brain was injured, this could have dramatically altered the sentencing calculus. *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2949, 106 L. Ed. 2d 256 (1989).

Expert testimony about Dr. Goff's report would also have nullified the testimony of the experts from Taylor Hardin, who concluded that appellant merely suffered from an antisocial personality disorder. *See, e.g., Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir.

1989). The symptoms of organic brain damage mimic the symptoms of the antisocial personality disorder. Kaplan and Sadock, *supra*, 1866-68; R. Slovenko, *supra*, at 400. The Taylor Hardin experts based their diagnosis of antisocial personality disorder on a notoriously unreliable mental status examination. While "psychiatrists widely and frequently disagree on what constitutes mental illness," *Ake v. Oklahoma*, 470 U.S. at 81, virtually all competent experts agree that mental status examination is inadequate to determine whether antisocial conduct is caused by organic brain damage or an antisocial personality disorder. Kaplan and Sadock, *supra*, at 835.

The defense would surely have prevailed in a battle of the experts, if counsel had been given an opportunity to present the "opposing views" of an expert, who understood why Dr. Goff's report was obviously superior to the Taylor Hardin evaluation. *See Ake v. Oklahoma*, 470 U.S. at 84. Dr. Goff administered a battery of neuropsychological tests, including the Halstead test. These tests are widely considered to be the most valid and reliable tool for detecting organic brain damage. Filskov and Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Goldfader and Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).

The defense was absolutely "devastated by the absence of...psychiatric...testimony" about these complex issues.

Ake v. Oklahoma, 470 U .S. at 83. James McWilliams' death sentence must be vacated because he was entitled to the assistance of an expert who could have explained to the court why Dr. Goff's diagnosis of organic brain damage called for a less severe penalty.

Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 93-99.

The Use of Testimony from the Lunacy Commission

The respondent contends that the claim that has not been exhausted because it was not fairly presented to the Supreme Court of Alabama during the direct appeal. *Respondents' Brief on the Grounds for Relief Presented in McWilliams' Petition for Writ of Habeas Corpus*, Court Document 11, at 31. The Alabama Supreme Court recited some of the facts upon which this claim is based, but the court did not deal with the issue the petitioner now presents to this court.

In his reply brief, however, the petitioner states:

> The State claimed the *Ake* violation at the penalty stage has not been exhausted because it was never presented to the Alabama Supreme Court. However, the Alabama Supreme Court had plain error review, held it reviewed James' record for not raised plain error, and reviewed the issues he raised before the Court of Appeals, and James raised the issue before the Court of Appeals, making it more likely the state appellate court came across the claim during its review of the record. *Julius v. Johnson* 840 F.2d at 1546, fn. 10. Hence James exhausted the issue.

Petitioner's Reply Brief, Court Document 16, at 22.

The Supreme Court has held that:

> [b]efore seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the "'"opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.'" *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) *(per curiam)* (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby

> alerting that court to the federal nature of the claim. *Duncan, supra*, at 365-366, 115 S. Ct. 887; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). This case focuses upon the requirement of "fair presentation."

Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349, 158 L. Ed. 2d 64 (2004).

In the instant case, McWilliams argues that because he raised this issue to the Court of Appeals, and because the Alabama Supreme Court reviewed the record for not raised plain error, and reviewed the issues the petitioner raised before the Court of Appeals, the claim was "fairly presented."[18] This argument is akin to that made by the petitioner in *Baldwin*. The *Baldwin* court summarized the facts of that case as follows:

> Michael Reese, the respondent, appealed his state-court kidnaping and attempted sodomy convictions and sentences through Oregon's state court system. He then brought collateral relief proceedings in the state courts (where he was represented by appointed counsel). After the lower courts denied him collateral relief, Reese filed a petition for discretionary review in the Oregon Supreme Court.

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18. The Petitioner does not use the term "fairly presented" or even argue that standard. However, since that standard is the one which applies, the court will apply it.

The petition made several different legal claims. In relevant part, the petition asserted that Reese had received "ineffective assistance of both trial court and appellate court counsel." App. 47. The petition added that "his imprisonment is in violation of [Oregon state law]." *Id.*, at 48. It said that his *trial* counsel's conduct violated several provisions of the *Federal* Constitution. *Ibid.* But it did not say that his separate *appellate* "ineffective assistance" claim violated *federal* law. The Oregon Supreme Court denied review.

Reese ultimately sought a federal writ of habeas corpus, raising, among other claims, a federal constitutional claim that his *appellate* counsel did not effectively represent him during one of his direct state-court appeals. The Federal District Court held that Reese had not "fairly presented" his federal "ineffective assistance of appellate counsel" claim to the higher state courts because his brief in the state appeals court had not indicated that he was complaining about a violation of *federal* law.

A divided panel of the Ninth Circuit reversed the District Court. 282 F.3d 1184 (2002). Although the majority apparently believed that Reese's petition itself did not alert the Oregon Supreme Court to the federal nature of the appellate "ineffective assistance" claim, it did not find that fact determinative. *Id.*, at 1193-

> 1194. Rather, it found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had had "the *opportunity* to read ... the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review." *Id.*, at 1194 (emphasis added). *Had they read the opinion of the lower state trial court*, the majority added, the justices would have, or should have, realized that Reese's claim rested upon federal law. *Ibid.*
>
> We granted certiorari to determine whether the Ninth Circuit has correctly interpreted the "fair presentation" requirement.

Baldwin, 541 U.S. at 29-30, 124 S. Ct. At 1349 - 1350 (emphasis in original).

The *Baldwin* court held:

> [T]o say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions-for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

Id. at 31. Further, the Court wrote:

> [O]rdinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Id. at 32.

McWilliams' reliance on *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), an Eleventh Circuit case decided sixteen years before the Supreme Court's decision in *Baldwin*, is misplaced. In *Julius*, the Eleventh Circuit clearly stated that:

> the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below.

Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988). Further, the footnote cited by the petitioner clearly states that the Court of Appeals never decided the issue in the instant case. *Julius*, 840 F.2d at 1546 n. 10 ("Nor need we decide whether such language permits federal review where the defendant raised the claim at trial, thus making it more likely that the state appellate court came across the claim during its review of the record.").

McWilliams makes no claim that the issues contained in this part of his habeas petition were raised to the Supreme Court of Alabama in a petition or a brief or a similar document. Thus, as to this claim, McWilliams did not exhaust available state remedies as required by *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 1732-33, 144 L. Ed. 2d 1 (1999).

However, a petitioner may still have his claim decided on the merits even if he failed to exhaust available state remedies, if he can show cause and prejudice or actual innocence. The petitioner has offered nothing in the way of cause to excuse his failure to present this claim to the Alabama Supreme Court. Further, as previously discussed, McWilliams has not made a showing that he is actually innocent. Thus, McWilliams is procedurally barred from raising this claim in federal court.

Whether *Ake* Was Violated by not Providing Petitioner with Expert Assistance at the Judicial Phase of the Sentencing

McWilliams again cites *Ake v. Oklahoma*, 470 U.S. 68, 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), where the Supreme Court held:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Appendix D

Ake v. Oklahoma, 470 U.S. 68, 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Further, the *Ake* Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83. Further, with respect to rebuttal purposes at the sentencing phase, the Court held:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id. at 84.

Appendix D

McWilliams contends that the trial court erred because, even though it ordered an examination of the defendant to determine if he had organic brain damage, at the sentencing proceeding "it refused to give counsel access to an expert to assist him in preparing and presenting his case." *Petition* at 96.

The psychological testing requested by McWilliams was ordered by the trial court, and, therefore, he received the assistance required by *Ake*. Dr. Goff completed the testing and a report was given to both the petitioner and the respondent. McWilliams complains that counsel "lacked the expertise to interpret the highly technical report," that "the report was useless without the testimony of a defense expert to explain it," and "defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of sophisticated neuropsychological tests that Dr. Goff administered." *Petition* at 97.

There is no evidence that Dr. Goff was unavailable to the petitioner for consultation or to call as a witness. Indeed, the record indicates that McWilliams never requested Dr. Goff's assistance. Instead, McWilliams' counsel insisted that a different expert review Dr. Goff's findings.

In discussing the right to psychiatrist's assistance the *Ake* court was clear:

> [t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83. Further, the *Ake* court limited psychological assistance to one expert. *Id.* at 78-79 ("This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today.") Dr. Goff was the expert appointed for McWilliams. The onus was McWilliams' counsel to consult Dr. Goff if he had questions or did not understand the report. Not only could Dr. Goff have explained the report to counsel, but also to the jury. [19]

As the Supreme Court said:

> Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met

19. Notably, the *specific* testing requested by counsel for the Petitioner was ordered in this case. This minimizes somewhat the claim that he could not understand these tests or their results.

> this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

Thus, the Court of Criminal Appeals' ruling on this issue was not contrary to clearly established Federal law as determined by the United States Supreme Court and did not involve an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. This claim is due to be denied.

***

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

In accord with the foregoing, the magistrate judge recommends that McWilliams' petition for a writ of habeas corpus and his requests for an evidentiary hearing be DENIED.

Appendix D

The parties have until February 15, 2008 to file objections. *In order to save everyone concerned time and effort, if the substance of an objection is that which has been set out already in pleadings or argument, the party objecting may simply* ***refer*** *to his previous argument, instead of repeating his argument in full in the form of objections.*

Done this 1st day of February, 2008.

/s/ Robert R. Armstrong, Jr.
Robert R. Armstrong, Jr.
United States Magistrate Judge

APPENDIX E—OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA, DATED AUGUST 23, 1991

COURT OF CRIMINAL APPEALS OF ALABAMA

No. 6 Div. 190

JAMES EDMUND MCWILLIAMS

v.

STATE

August 23, 1991

OPINION

McMILLAN, Judge.

The appellant was indicted in a four-count indictment on charges of capital murder: counts I and II of the indictment charging the appellant with committing murder during a robbery in the first degree, in violation of § 13A-5-40(a)(2), *Code of Alabama 1975;* count III charging the commission of murder during rape in the first degree, in violation of § 13A-5-40(a)(3), *Code of Alabama 1975;* and count IV charging the appellant with committing murder during sodomy in the first degree, in violation of § 13A-5-40(a)(3), *Code of Alabama 1975.* Subsequently, count IV of the indictment was dismissed. Following the trial, the appellant was found guilty as charged in counts I through III of the indictment, and following a separate sentencing

hearing the jury, by a vote of 10 to 2, recommended a verdict of death. Thereafter, the trial court conducted a separate sentencing hearing, following which the appellant was sentenced to death by electrocution.

This court adopts the trial court's specific findings concerning the circumstances of the crime and the appellant's participation therein, as set forth below:

> "The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.
>
> "Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.
>
> "Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

Appendix E

"The defendant was identified by eyewitnesses who placed him at the scene.

"The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

"The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty."

I

The appellant argues that the trial court denied him an individualized determination of the appropriate punishment by refusing to consider his organic brain damage as a mitigating circumstance. The record indicates that, during the penalty stage of his trial before the jury, the appellant presented evidence that he had suffered two head injuries and that he had visited medical professionals as a result of those head injuries. During his sentencing hearing before the trial judge, the appellant presented evidence indicating that he might suffer from some organic brain dysfunction, although, as that court noted, the report suggesting such dysfunction also indicated that the appellant was exaggerating his problems.

Appendix E

The record further reveals that the trial court did consider this mitigating circumstance, but found that it was not supported by the evidence. In his sentencing findings, the trial court first considered the statutory mitigating circumstances, stating in pertinent part:

> "This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.
>
> "Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase; however, after consideration of this evidence, this Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance."

Thereafter, in considering the nonstatutory mitigating circumstances presented by the appellant, the trial court stated:

> "In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its advisory verdict to present any other evidence of mitigating circumstances and to make any statement of mitigating circumstances. The defendant testified that he received two blows to the head at various times and places, and this resulted in some organic brain damage.

Appendix E

"Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuropsychological testing, and this request was granted.

"This Court interprets Section 13A-5-47 of the Code of Alabama 1975 as limiting . . . what additional evidence may be presented in the 3rd phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

"Nevertheless, the Court reviewed additional evidence presented by the defense as to the result of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor-Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports, the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

"The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance."

"'It is not required that evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the trial judge.' *Mikenas v. State*, 407 So.2d 892, 893 (Fla. 1981).

> "'"'Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance and sentencing is proven and the weight to be given it rests with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla. 1979)." *Smith v. State*, 407 So.2d 894, 901 (Fla. 1981).'"

Harrell v. State, 470 So.2d 1303, 1308 (Ala.Cr.App.1984), affirmed, 470 So.2d 1309 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985).

> "It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case,

> the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. *Cochran v. State,* 500 So.2d 1161 (Ala.Cr.App 1984), affirmed in pertinent part, remanded on other part, 500 So.2d 1179 (Ala. 1985), affirmed on return to remand, 500 So.2d 1188 (Ala.Cr.App.), affirmed, 500 So.2d 1064 (Ala. 1986), cert. denied, 481 U.S. 1033, 107 S.Ct. 1965, 95 L.Ed. 2d 537 (1987)."

Haney v. State, 603 So.2d 368 (Ala.Cr.App.1991). See also *Bankhead v. State,* 585 So.2d 97 (Ala.Cr.App.1989), remanded on other grounds, 585 So.2d 112 (Ala.1991) ("[w]hile *Lockett* and its progeny require consideration of all evidence submitted as mitigating, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority").

The trial court clearly found that the evidence presented by the appellant did not rise to the level of a mitigating circumstance. We find no abuse of the trial court's discretion in this regard.

II

The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a

motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor-Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor-Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms suggestive of head injury when he was at Taylor-Hardin.

Appendix E

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.'" The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

Appendix E

The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an expert to testify. The State argues that when the appellant read into evidence the psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner

that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).[1] The United States Supreme Court distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> "We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.

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1. In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

> "'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' *[Estelle v. Smith],* at 465. [101 S.Ct. at 1874]

"We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' *Id.*, at 468 [101 S.Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, at 422, 107 S.Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, at 425, 107 S.Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present case makes the same argument. The United States Supreme Court replied to this argument, stating:

> "Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion. . . . Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about the defendant's mental condition, . . ., will be undermined by a decision in favor of the Commonwealth.

> "While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required . . . and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in *Smith* that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' *[Estelle v. Smith,]* 451 U.S., at 468 [101 S.Ct. at 1875]. Thus, where a defendant does not make an issue of his mental condition, we fail to see how the decision today will undermine *Pate [v. Robinson,* 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal."

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S.Ct. at 1919, n.21.

The holding in *Ake v. Oklahoma,* supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the

present case, the appellant was provided with psychiatric assistance; thus the principle of *Ake* was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986).

III

The appellant argues that he was denied the effective assistance of counsel when the trial court refused to give his attorney any time to evaluate the use of the mitigating evidence of organic brain damage, which was disclosed to him "at the last moment."

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Despite the appellant's argument to the contrary, there is no indication in the record that the State interfered with the appellant's right to the effective assistance of counsel, by failing to produce all of his medical records from Holman Prison and all of his medical records from Taylor-Hardin Secure Medical Facility sufficiently in advance of his trial or sentencing hearing. The appellant argues that the medical records were not received until after the penalty stage of his trial before the jury and that this delay prejudiced his case. However, as the State argues, the record indicates that the appellant first requested a psychiatric examination by motion filed on January 21, 1985, which motion was granted on January 29, 1986. The psychiatric examination was conducted at Taylor-Hardin Secure Medical Facility over a period from April 2, 1986, to May 29, 1986. The resulting report was filed with the trial court on June 4, 1986, and copies were provided to defense counsel and the State. Defense counsel argues that the appellant filed a subpoena duces tecum, ordering representatives of Taylor-Hardin to produce medical records on June 18, 1986. On July 18, 1986, the appellant filed a motion to have Taylor-Hardin held in contempt for failing to comply. On July 21, 1986, the trial court ordered Taylor-Hardin to produce all its records relevant to the appellant, and this order was complied with on July 25, 1986. Thereafter, the appellant filed a petition to hold Taylor-Hardin in contempt for failing to produce the actual raw test data, and the trial court ordered these documents produced on July 31, 1986. The order was complied with on August 1, 1986. The appellant's trial began on August 20, 1986, and the jury returned with its verdict on August 27, 1986.

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Either prior to the trial or prior to the sentencing stage before the jury, which occurred on August 28, 1986, the appellant did not request a continuance to obtain further records. Following the penalty stage before the jury, on September 3, 1986, the appellant filed a motion to show cause, alleging that on August 13, 1986, he had served a subpoena duces tecum on Holman Prison requesting that his psychiatric records be produced and that Holman Prison had failed to comply. This subpoena does not appear in the record. On September 3, 1986, the trial court ordered Holman Prison to produce the psychiatric records before October 1, 1986, and also ordered the appellant's neuropsychological examination, which he had requested, and which was completed on October 3, 1986, with a report being filed on October 7, 1986. The appellant was subsequently sentenced on October 9, 1986.

We find no prejudice to the appellant on the basis of any alleged interference by the State, although there is some indication of delays in providing reports. It is clear from the appellant's own testimony during the penalty phase before the jury, that he had long been aware of his head injuries and that he had sought medical evaluation as to the possibility of any organic brain damage based thereon. As he testified, he had been told that he had none. Moreover, the lunacy commission found no indications of any organic brain damage.

Nor did the trial court err in denying the appellant's motion for a continuance in order for the appellant to have additional time to review the neuropsychologist's report and to consult with an expert about the report.

Appendix E

"Applying the principles of the capital case of *Ex parte Hays*, 518 So.2d 768 (Ala. 1986), we find it extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial and that the defendant has not met his burden of showing actual prejudice in the defense of the charge for which he was convicted. In *Hays*, our Supreme Court wrote:

> "'Hays contends that the trial court's denial of his motion for continuance, under the facts of this case, denied him his constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. The Court of Criminal Appeals rejected this argument because Hays failed to show any actual prejudice in the defense of his case as a result of the trial court's denial of his motion. We agree.
>
> "'The United States Supreme Court in *Morris v. Slappy*, 461 U.S. 1, 11-12, 75 L.Ed.2d 610, 619, 103 S.Ct. 1610, 1616 (1983), recognized that:
>
> "'Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's

> Sixth Amendment right to counsel. See *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

"'*See also, Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L. Ed. 377 (1940); *Connor v. State*, 447 So.2d 860 (Ala.Cr.App.1984). Furthermore, it is evident from recent Supreme Court precedent that, although certain criteria such as the time provided for the investigation and preparation of the case, counsel's experience, the gravity of the charge and complexity of defenses, and counsel's accessibility to witnesses are relevant factors to consider

when evaluating effectiveness of counsel, the controlling analysis is whether the action prejudiced the accused in the defense of his or her case. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The accused has the burden of proving prejudice by making a showing that he or she did not receive "a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668 [687], 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). As opined in *United States v. Cronic, supra*:

> "'"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred."

"'466 U.S. at 656, 104 S.Ct. at 2045, 80 L.Ed.2d at 666.' *Hays*, supra, 518 So.2d at 771-72."

Fortenberry v. State, 545 So.2d 129, 139-40 (Ala. Cr.App.1988), affirmed, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

In the present case, the appellant has demonstrated no prejudice by the trial court's denial of his motion for continuance. The trial court stated that it had reviewed the report and had found that, while the report indicates that there may have been some indication of organic brain dysfunction, the report also made continual references to the fact that the appellant appeared to be feigning or faking his problems during the examination.

IV

The appellant argues that his right against self-incrimination was violated by the prosecution's presentation of the testimony of the psychiatrist and psychologist who examined him. The appellant cites *Estelle v. Smith,* 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981), in support of his argument. However, this argument has been held to be without merit under similar circumstances in *Buchanan v. Kentucky,* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). See discussion at part II.

V

The appellant argues that he was denied his constitutional right to confront the authors of the victim impact statements, which were attached to the presentence report, in violation of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The appellant argues that, even if the victim impact statements did not violate *Booth v. Maryland,* supra, they violated *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1985), in that

the appellant was not allowed the opportunity to cross-examine the authors of the victim impact statements.

The appellant's argument that the victim impact statements attached to the presentence investigative report, as well as the testimony of the victim's husband and photographs of the victim, were introduced in violation of *Booth v. Maryland*, supra, is without merit because the United States Supreme Court has recently overruled the applicable holding in *Booth v. Maryland*, supra, and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). See *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720. In *Payne v. Tennessee*, the victim impact statements included testimony by a family member of the victims and comments made by the prosecutor during his arguments to the jury. However, the United States Supreme Court noted that in *Booth v. Maryland*, a statute that required the presentence report in all felony cases to include a "victim impact statement" describing the effect of the crime on the victim and the victim's family was at issue. The court indicated that the source of these statements was not a distinguishing feature, stating:

> "Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. Evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had

> been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional."

In overruling *Booth v. Maryland*, supra, the United States Supreme Court stated:

> "[W]hile virtually no limits are placed on the relevant mitigating evidence a Defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' *Mills v. Maryland*, 486 U.S., at 397, 108 S.Ct. 1860 at 1876, 100 L.Ed. 384 (1988)] (Rehnquist, C.J., dissenting), or demonstrating the loss of the victim's family and to society which have resulted from the defendant's homicide. *Booth* reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a '"mini-trial" on the victim's character.' *Booth*, supra [482 U.S.], at 506-507 [107 S.Ct. at 2534-2535]. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for

tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, 'the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' *Barefoot v. Estelle*, 463 U.S. 880-898, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

". . . .

Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth*

> Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)."

Payne v. Tennessee, supra, U.S. at 822-825, 111 S.Ct. at 2607-2608.

Moreover, the victim impact statements attached to the pre-sentence investigative report were not inadmissible as hearsay which denied the appellant his right to confrontation.

> "It is clear to this Court that the use of the presentencing report is consistent with Ala. Code 1975, § 13A-5-45(d), Alabama's capital murder statute, which states:
>
> > Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to

> rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.

> "The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under Ala. Code 1975, § 13A-5-47. *Thompson v. State,* [503 So.2d 871 (Ala.Cr.App.1986), affirmed, 503 So.2d 887 (Ala.1987), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987)]. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State,* 399 So.2d 859 (Ala. Crim.App.1979), aff'd in part and rev'd on other grounds, 399 So.2d 873 (Ala.1981)."

Ex parte Davis, 569 So.2d 738, 741 (Ala.1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). "No right to cross-examine was denied, as is contended. Appellant would have been entitled to call, as a witness, any person who could give information about the report, including its author, but apparently chose not to do so." *Haney v. State,* 603 So.2d 368 (Ala.Cr.App.1991).

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The evidence contained in the victim impact statements was relevant to this case, especially in light of *Payne v. Tennessee,* supra, and the defendant was given an opportunity to rebut the evidence. Therefore, there was no error. See *Thompson v. State,* supra; *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991).

VI

The appellant argues that his rights to the presumption of innocence and the reliability of the sentencing trial were undermined when a guard provoked an argument with him in front of several jurors, while he was wearing handcuffs. The record indicates that, after the proceedings had ended on one day of the trial and the jury had been escorted out of the courtroom, a confrontation arose between the defendant and a guard who was to escort the defendant back to his cell. The confrontation apparently began in the courtroom and continued into the hall of the courthouse. The appellant was handcuffed by the guard while in they were in the courtroom and he was then led out into the hall, where words were apparently exchanged—possibly concerning the appellant's guilt or innocence. On the following morning, the jurors were individually questioned as to what they heard or saw concerning the incident, and whether anything they might have seen or heard would prejudice them against the appellant or the State in any way. Each juror who indicated any sort of awareness of the matter testified that he or she would not be prejudiced against the appellant or the State. Thus, the appellant suffered no actual prejudice.

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The appellant cites cases which warn against the prejudicial effect of allowing the jury to view a defendant in shackles or handcuffs during his trial. However, in light of the fact that few jurors polled stated that they saw the appellant in handcuffs, and that those that did stated that it would not prejudice them against the appellant, there was no error.

> "'All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner's fate impartially . . . .'

"Not to be overlooked, is the distinction made in *Clark [v. State,* 280 Ala. 493, 195 So.2d 786 (1967)], between handcuffing a prisoner in taking him to and from the court and in keeping him in handcuffs while he is being tried, unless there is reasonable ground for belief that such restraint is necessary to prevent his escape or his rescue.

> "'Furthermore, it is not ground for a mistrial that an accused felon appear in the presence of the jury in handcuffs when such appearance is only a part of going to and from the

> courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried. *Rhodes v. State*, 34 Ala.App.481, 41 So.2d 623.' [(1949)] *Evans v. State*, Ala.Cr.App., 338 So.2d 1033 [1976], cert. denied, 348 So.2d 784 (1977)."

Taylor v. State, 372 So.2d 387, 389 (Ala.Cr.App.1979). See also *Cushing v. State*, 455 So.2d 119, 121 (Ala.Cr.App.1984) ("[i]t is not ground for a mistrial that the accused appeared before the jury in handcuffs when this appearance was only a part of going to and from the courtroom"). *Campbell v. State*, 484 So.2d 1168, 1170 (Ala.Cr.App.1985) (wherein the court held that the trial court did not abuse its discretion by allowing the jury to see the defendant restrained in shackles where "[t]here is little doubt that the appellant here had substantial reason to attempt to escape, since he faced a sentence of life without parole . . ."). Under the circumstances of this case, and in light of the showing of no actual prejudice, we find no abuse of discretion by the trial court in allowing the appellant to be handcuffed for purposes of going to and from the courtroom.

VII

The appellant argues that the jury instructions concerning the especially heinous, atrocious, or cruel statutory aggravating circumstance violated the Eighth Amendment in that they were too vague to adequately guide the jury. He further argues that this aggravating circumstance was not supported by the facts.

Appendix E

The record indicates that, in defining the aggravating circumstances which the jury could consider in arriving at its advisory verdict, the trial court charged:

> "'The capital offense was especially heinous, atrocious, or cruel, compared to other capital offenses.'
>
> "The term 'heinous' means especially wicked or shockingly evil. The term 'atrocious' means outrageously wicked and violent. The term 'cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a criminal capital case is committed."

These instructions were sufficient to overcome the vagueness condemned in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (wherein the United States Supreme Court held that the words "especially heinous, atrocious, or cruel," without more,

are unconstitutionally vague, as they fail to sufficiently inform juries of what they must find in order to impose the death penalty). See also *Lawhorn v. State*, 574 So.2d 970 (Ala.Cr.App.1990), affirmed, 581 So.2d 1179 (Ala.1991) (wherein the trial court gave the following instruction to the jury concerning this aggravating circumstance: "[a]nother one that you could consider but is not proven by your verdict is that the capital offense was especially heinous, atrocious, or cruel, compared with other capital offenses as set out in Subdivision 8 defining aggravating circumstances").

However, where sufficient guidance is given to the jury by the trial court's adequately defining the terms used so that the jury is made aware of what it must find in order to impose the death penalty, such an instruction is constitutionally acceptable. See *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991), the appellant challenged a jury instruction concerning this aggravating circumstance, which was similar to the one given in the present case, as unconstitutionally vague. That trial court instructed the jury as follows:

> "'The word "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and vile. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

> "'What is intended to be included in this aggravating circumstance is those cases where the actual commission of a capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.
>
> "'For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be [a] consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness or atrociousness or cruelty exceeds that which [normally] exists when a capital offense is committed.'"

Id. at 385-386. This court held that these instructions met the constitutional standard and sufficiently overcame the vagueness prohibition of *Maynard v. Cartwright*, supra. This court held:

> "These instructions were proper and furnished adequate guidance to the jury. The court's instructions that this aggravating circumstance should apply to the consciousless or pitiless crime which is unnecessarily tortuous to the victim and one in which the brutality exceeds

> that which is normally present in any capital offense met the requirements of law. See *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981); *Hallford v. State*, 548 So.2d 526 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala. 1989), cert. denied [493 U.S. 945], 110 S.Ct. 354 [107 L.Ed.2d 342] (1989)."

Haney, supra, at 386.

Moreover, the trial court properly instructed the jury on this aggravating circumstance because the evidence presented in this case was sufficient to show its existence. The trial court stated:

> "This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery."

The record indicates that the victim bled to death, after having been shot a number of times while she was standing and then lying on the floor, and after having been raped. Her death did not come for two hours after she had been shot. Witnesses testified that, as she clung to a mop in the back of the Austin's Convenience Store, she stated, "It just hurts so bad," and indicated that she "was burning," was "losing it," and that she was having great difficulty breathing. At the hospital, she begged

to see her husband and child because she knew she was going to die. The execution-type slaying in this case, the number of shots fired into the victim, and the nature of the victim's suffering all indicate that an instruction on this aggravating circumstance was appropriate. See, e.g., *Lawhorn*, supra ("[w]hen a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by gunshots to the chest, such 'extremely wicked or shockingly evil' action may be characterized as especially heinous, atrocious, or cruel"). *White v. State*, supra ("[e]vidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel").

VIII

The appellant argues that the jury's general verdict recommending the death penalty, without specifying whether any of the statutory aggravating circumstances were found, violated the Eighth Amendment, because it was not "rationally reviewable." However, jury specification of aggravating and mitigating circumstances is not constitutionally required. See *Bush v. State*, 431 So.2d 555, 559 (Ala.Cr.App.1982), affirmed, 431 So.2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.175 (1983); *Morrison v. State*, 500 So.2d 36, 42 (Ala.Cr.App.1985), affirmed, 500 So.2d 57 (Ala. 1986), cert. denied, 481 U.S. 1007, 107 S.Ct. 1634, 95 L.Ed.2d 207 (1987); *Rutledge v. State*, 482 So.2d 1250, 1259 (Ala. Cr.App.1983), affirmed in pertinent part and reversed on

other grounds, 482 So.2d 1262 (Ala.1984); *Whisenhant v. State*, 482 So.2d 1225, 1239 (Ala.Cr.App.1982), affirmed in pertinent part and reversed on other grounds, 482 So.2d 1241 (Ala.1983), affirmed on remand, 482 So.2d 1246 (Ala. Cr.App.1983), reversed on other grounds, 482 So.2d 1247 (Ala.1984).

IX

The appellant argues that the trial court erred by denying his challenge for cause against a potential juror, W. G. G., without allowing him to effectively voir dire the juror about his ability to consider mitigating circumstances and to recommend a life sentence in this case. The record indicates that during the voir dire of the jury venire in this case, the defense counsel asked the following:

> "[DEFENSE COUNSEL]: . . . And if you find that the State has convinced you beyond a reasonable doubt and to a moral certainty that the Defendant, James McWilliams, is guilty of the things charged in this indictment, and no lesser offense—that is, he is guilty of a capital crime—if you have found him guilty of that crime, then, there would be a second hearing at which that same jury would hear evidence of aggravating and mitigating circumstances. Now, what I am asking is: If you were to serve on this jury, and if you and the 11 people who were on that jury with you were convinced beyond a reasonable doubt that James McWilliams was

guilty of a capital offense, is there any person who feels that automatically a death sentence should be imposed? That is, if he was guilty of a capital offense, then, the death penalty would be imposed? Is there anyone who feels that way? If there is, would you please stand?

"PROSPECTIVE JURORS: W.G.G.; T.W.

"THE COURT: [Defense counsel], since you have gone into that, perhaps you should also tell the jury the other punishment that is available.

"[DEFENSE COUNSEL]: I will get to that. Thank you, Judge.

"OTHER JURORS ALSO RESPONDING: R.B.; A.H.; M.S.; D.F.; J.S.; T.O.; C.S.; W.D.W.; M.F.; R.R.; M.B.; D.B.; W.F.; T.K.

"NO FURTHER RESPONSES.

"[DEFENSE COUNSEL]: Now, the law provides for only two punishments if the Defendant is found guilty. And that is a sentence of death or a sentence of life in prison without parole. Those would be the only two sentences available, if that Defendant is convicted of the capital crime as charged in the indictment. Those of you who stood up and said that you believed that if he was guilty of this crime, he should receive a death sentence—those of you

who said that—would the fact that you had an alternative of a sentence of life without parole, affect your decision? That is, could you give him life without parole if you were convinced, along with 11 others on the jury, that he was guilty of a capital offense? If you could, those of you who stood up would you stand up again?

"PROSPECTIVE JURORS: W.G.G.

"[DEFENSE COUNSEL]: Mr. G:, would you consider that an alternative punishment?

"JUROR GRAMMER: Yes, sir."

Thereafter, several potential jurors were individually voir dired, among them W.G.G. During that questioning, the following occurred when W.G.G. was being examined by the prosecutor:

"[PROSECUTOR]: Mr. G., earlier you were asked the question that if you were serving on the jury and you reached a decision, along with the other members of the jury, that the Defendant was guilty of capital murder, and you indicated that you would impose the death penalty. Let me ask you this: Although in a given case, in this case you might ultimately arrive at your final decision: that being the death penalty, would you consider the evidence, and consider both life without parole and the death penalty before reaching your final decision?

"[W.G.G.]: Yes, sir.

"Q: All right. I believe that's all.

"RE-EXAMINATION BY [DEFENSE COUNSEL]:

"Q: Mr. G., if you and the 11 other jurors found the Defendant guilty of a capital offense: that is, you found in this case, James McWilliams had done what you were talking about that he had been through, shot the girl during the robbery and whatever else the proof might be, 'being so bold,' as you would still be able to consider mitigating circumstances and recommend a sentence of life without parole?

"[PROSECUTOR]: We object, Your Honor.

"THE COURT: Sustained.

"Q: Would you be able to recommend a life sentence without parole, as opposed to the death sentence, if you had already found him guilty beyond a reasonable doubt of the things that are alleged in this case?

"[PROSECUTOR]: It is not whether he would recommend that, but whether he would consider the two alternatives?

"THE COURT: Sustained.

"Q: I will accept Your Honor's ruling, and stay on my question. I will stand with the question.

"THE COURT: I don't think so. You are asking him to decide it now.

"[DEFENSE COUNSEL]: I am asking a hypothetical question, if he found the defendant guilty, if he were convinced beyond a reasonable doubt that he had done the things alleged in this indictment that you have heard about, and that we have talked about, are you saying that you could consider mitigating circumstances and recommend a sentence of life without parole? Or do you feel that you would have to recommend the death sentence?

"[PROSECUTOR]: We object on the same grounds. The question is not answerable.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: We'll except to Your Honor's ruling that we are asking the jury to pre-judge the evidence. I am asking him to pre-judge on a finding of guilt here, Mr. G. There would be 2 punishments available. Can you consider both of them?

"THE WITNESS: Yes, I could.

"Q: I have no further questions."

Thereafter, the defense counsel challenged W.G.G. for cause, stating that he should be able to ask the witness a hypothetical question. The trial court denied the challenge.

This potential juror clearly indicated that he could consider a sentence of life without parole, as well as a death sentence, and that his views on the death penalty would not prevent or substantially impair his duties as a juror. Therefore, the trial court did not abuse his discretion in denying the challenge for cause.

> "The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." '*Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987). 'The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath notwithstanding his views on capital punishment.' *Dutton v. Brown,* 812 F.2d 593, 595 (10th Cir.), cert. denied, *Dutton v. Maynard,* 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). A juror's bias need not be proved with 'unmistakable clarity' because 'juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.' *Id.*

> "A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' *Witt,* 469 U.S. at 429, 105 S.Ct. at 855. That finding must be accorded proper deference on appeal. *Id.* 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' *Nobis v. State,* 401 So.2d 191, 198 (Ala.Cr.App.), cert. denied, *Ex parte Nobis,* 401 So.2d 204 (Ala.1981)."

Martin v. State, 548 So.2d 488, 490-91 (Ala.Cr.App.1988), affirmed, 548 So.2d 496 (Ala. 1989), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989).

Moreover, the trial court did not err in "limiting" the defense counsel's ability to question the potential juror on voir dire.

> "'In the process of selecting the jury from the venire afforded, each party has the right to have questions formulated by it propounded to the jury, either by the court or by the party as the court may determine, if such questions reasonably relate under the circumstances to the question of the qualification or interest or bias on the part of prospective jurors." *Griffin v. State,* 383 So.2d 873, 876 (Ala.Cr.App.), cert. denied, 383 So.2d 880 (Ala.1980), quoted with

> approval in *Alabama Power Co. v. Bonner*, 459 So.2d 827, 833 (Ala. 1984).'
>
> "*Heath v. State*, 480 So.2d 26, 28 (Ala. Cr.App.1985). It is well settled that the trial court has discretion regarding how the voir dire examination of the jury venire will be conducted, and that reversal can be predicated only upon an abuse of that discretion. *Ervin v. State*, 399 So.2d 894 (Ala.Cr.App.), cert. denied, 399 So.2d 899 (Ala. 1981); *Peoples v. State*, 375 So.2d 561 (Ala.Cr.App.1979)."

Bui v. State, 551 So.2d 1094, 1110 (Ala.Cr.App.1988), affirmed, 551 So.2d 1125 (Ala.1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991).

In the present case, the trial court sustained the prosecutor's objection on the ground that the formulation of defense counsel's questions required the potential juror to decide which sentencing alternative he would choose if he found this appellant guilty. The defense counsel was allowed to elicit from the potential juror whether he would consider a sentence of life imprisonment without parole. Therefore, we find no abuse of discretion by the trial court.

X

The appellant argues that the prosecutor undermined the reliability of the jury's advisory verdict because of comments made during his closing argument in the

penalty phase before the jury. The appellant cites seven different instances of alleged improper prosecutorial comment.

The first comment by the prosecutor concerned the aggravating circumstances which he claimed to be applicable to the case. He stated that among these circumstances he expected that the trial court would charge "that the capital offense was committed by a person under sentence of imprisonment." He further stated that evidence had been presented that the appellant had been previously convicted on two occasions. The defense counsel objected, noting that "the courts have interpreted that as being a person who was in prison at the time the crime was committed." The trial court sustained defense counsel's objection. The prosecutor then acknowledged, "I am incorrect: the first one [above-quoted aggravating circumstance] is not the applicable one." The appellant did not request a curative instruction and none was given. Thereafter, during its oral charge to the jury, the trial court instructed the jury on the aggravating circumstances which could properly be considered. "'The general rule is that prejudicial statements, even though improper, are considered capable of being eradicated by the trial court in sustaining objections thereto or by appropriate instructions to the jury or both. *Meredith v. State*, 370 So.2d 1075 (Ala.Crim.App.), *cert. denied*, 370 So.2d 1079 (Ala.1979).' *Bui v. State*, 551 So.2d 1094 (Ala. Crim App.1988)." *Holladay v. State*, 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989).

Appendix E

The appellant also cites a comment made by the prosecutor as he was addressing the applicability of each statutory mitigating circumstance to this case. The prosecutor stated:

> "Two, the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. He has a mental problem in this sense: that he has a mind which is just criminal. He is just bad. What else can you say? He is a dangerous man, and he has proven it."

The appellant argues that, by this comment, the prosecutor argued that the jury could not consider his alleged psychiatric problems. However, it is clear that the prosecutor was arguing that the statutory mitigating circumstance that "the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," did not apply to the facts and evidence presented in this case.

The appellant argues that the prosecutor's argument suggested that only statutory mitigating circumstances could be considered by the jury. The appellant bases his argument on the fact that the prosecutor listed the statutory mitigating circumstances and commented on each one. However, in *Bankhead v. State,* 585 So.2d 97 (Ala.Cr.App.1989), the prosecutor raised the same argument. This court found no impropriety in the fact that "in closing argument, the State went down the list of statutory mitigating circumstances, contending that none of these applied." *Bankhead,* supra, at 107.

Appendix E

The record further indicates that following the prosecutor's listing of the statutory mitigating circumstances the defense counsel objected on the basis that the list of statutory circumstances was not inclusive and that other circumstances may be considered. The trial court responded, "Counsel has the right to argue the law, but the Court will be the final authority on the law." The trial court then sustained the appellant's objection. The action of the trial court eradicated any error. See *Holladay,* supra, at 131, and cases cited therein. Moreover, during his oral charge to the jury, the trial court clearly instructed the jury that nonstatutory mitigating circumstances were to be considered by the jury, as well as the statutory mitigating circumstances. The trial court listed and described the pertinent nonstatutory mitigating circumstances.

The appellant also cites as error the following prosecutorial argument:

> "Let me comment on the reasons for penalties, as I see it, or as I think all of you would agree. One reason is to rehabilitate somebody, to change their behavior and make them a good citizen. Is rehabilitation applicable in this case? I submit to you no, it is not. Another one is retribution, just punishment. And I think that society has a need to feel that when a man does the horrible crime that this man has committed, that people out there need to feel and know that the system works, and that the man has been punished to the degree that he can be punished in our society, which, in this

> case, is the maximum sentence. Another one is deterrent: that is, to deter—in other words, the punishment that might be applied to one defendant hopefully will deter others from thinking about committing the same kind of crime. Isn't that applicable in this case?"

Deterrence, retribution, and society's right to self-defense have all been held to be proper subjects of prosecutorial argument. See, e.g., *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988) ("[i]t is proper to argue deterrence in a sentencing phase closing argument"). *Holladay v. State,* 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (retribution argument was held proper). *Kuenzel v. State,* supra (argument concerning society's right of self-defense was held proper).

The appellant cites as error the following statements made by the prosecutor:

> "Then when he had satisfied that animal lust of his and reached an ejaculation, that is how that happened to be on her slacks. . . . I am suggesting to you that it is your duty, your obligation under the facts of the evidence in this case, to do that: to carry out your job as it should be done because we have to cut out a cancer sometimes."

As to the prosecutor's reference to the appellant's "animal lust":

> "'The prosecutor's statements are not evidence. *Henry v. State,* 468 So.2d 896, 899 (Ala.Cr.App.1984), *cert. denied,* 468 So.2d 902 (Ala.1985). Further, prosecutors are to be allowed a wide latitude in their exhortations to the jury. *Varner v. State,* 418 So.2d 961 (Ala.Cr.App.1982). "Statements of counsel and argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict." *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984).'

"*Armstrong v. State,* 516 So.2d 806, 809 (Ala.Cr.App.1986). Furthermore, '[t]he trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Garrett v. State,* 268 Ala. 299, 105 So.2d 541 (1958); *Hurst v. State,* 397 So.2d 203 (Ala.Crim.App.), cert. denied, 397 So.2d 208 (Ala.1981).' *Henderson v. State,* 460 So.2d 331, 333 (Ala.Cr.App.1984).

". . .'[A] prosecutor as well as defense counsel has a right to present his impressions from the evidence,' and '[h]e may argue every legitimate inference from the evidence and may examine,

> collate, sift, and treat the evidence in his own way.' *Watson v. State,* 398 So.2d 320, 328 (Ala. Cr.App.1980), writ. denied, 398 So.2d 332 (Ala. 1981), cert. denied, 452 U.S. 941, 101 S.Ct. 3085, 69 L.Ed.2d 955 (1981)."

Henderson v. State, 584 So.2d 841, 856 (Ala.Cr.App.1989), remanded, 584 So.2d 862 (Ala.), affirmed, 587 So.2d 1071 (Ala.Cr.App.1991).

As to the prosecutor's reference to the appellant as a "cancer that needed to be 'cut out' of society, "the law is clear that '[i]n a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case.'" *Pierce v. State,* 576 So.2d 236 (Ala.Cr.App.1990), cert. denied, 576 So.2d 258 (Ala. 1991), quoting *Nicks v. State,* 521 So.2d 1018, 1023 (Ala.Cr.App.1987), affirmed, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988).

The appellant contends that the prosecutor erred in arguing that the victim was raped from behind, because, he argues, this fact was not supported by facts introduced into evidence. However, there was evidence that there was semen found on certain places on her slacks, which were still around her lower legs when she was found. Thus, this argument was proper as a reasonable inference to be drawn from the evidence. See *Henderson v. State,* supra.

The appellant cites three instances in which he claims that the prosecutor injected his personal opinion into the closing argument. The appellant appears to be referring to the prosecutor's comments that society needed protection and that the evidence presented concerning the appellant's mental state indicated not that he was mentally ill, but rather that he was simply mean. This argument was based on the report from the lunacy commission stating that the appellant did not have a mental defect, but rather had a character defect and repercussions from that defect. While it is never proper for the prosecutor to express his personal opinion as to the guilt of the accused during closing argument, reversible error does not occur when the argument complained of constituted mere expression of opinion concerning inferences, deductions and conclusions drawn from the evidence.' *Sams v. State,* 506 So.2d 1027, 1029 (Ala.Cr.App.1986)." *Henderson v. State,* supra.

In reviewing claims of improper prosecutorial argument, comments made by the prosecutor must be examined in the context of the entire trial. *Duren v. State,* 590 So.2d 360 (Ala.Cr.App.1990). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464 [2471], 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1975)." *Bankhead v. State,* 585 So.2d 97 (Ala. Cr.App.1989). We find no denial of due process resulting from the prosecutor's comments during his closing statement, nor do we find any error in those comments.

Appendix E

XI

The appellant argues that he was denied his rights to due process by the trial court's refusal to instruct the jury on a lesser included offense of felony murder, because he argues that a rational jury could have found that the robbery was committed by two men and that the appellant was not the triggerman or an accomplice to the murder. However, the evidence presented at trial clearly indicates that the appellant was not entitled to such a charge. There was no reasonable theory which could have been drawn from the evidence to support the appellant's contention that the jury might have concluded that there were two men involved. The appellant bases his argument on the fact that certain of the identifications given by witnesses varied and did not perfectly match the appellant. However, each of these witnesses positively identified the appellant as the man they saw at the time of the offense. The appellant was identified as the man present during the offense; he was found with the murder weapon in his possession; and the victim's dying declarations clearly indicated that there was only one man involved.[2]

> "In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United States Supreme Court held that the sentence of death could not be imposed after a jury verdict of guilt of a capital offense when the jury was precluded

2. There was testimony that, after the victim was found, she stated repeatedly that she did everything that the "son of a bitch" wanted, but that he still shot her. Her statements made at the hospital similarly only indicated one perpetrator.

> from considering a verdict of guilt of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. Subsequently, in *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1981), the Supreme Court clarified its decision in *Beck, supra*, to require that only when the evidence warrants such an instruction must a lesser included offense instruction be given. In so holding, the Court upheld the constitutionality of the following Alabama standard as applied in capital cases: 'a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position."' *Hopper*, 456 U.S. at 611, 102 S.Ct. at 2053 (quoting *Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973))."

Ex parte Julius, 455 So.2d 984, 986 (Ala. 1984), cert. denied, 469 U.S. 1132, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985). The appellant was not entitled to a charge on felony murder because there was no reasonable theory from the evidence which would have supported such a charge.

XII

The appellant argues that the prosecutor used inadmissible hearsay testimony concerning Jerry Porter's alibi to disprove the defense theory that the appellant was mistakenly identified as the killer. The record indicates that, shortly following the offense, the police received

information incriminating Jerry Porter in the instant offense. Thereafter two of the witnesses to the offense "tentatively identified" Jerry Porter as the man they had seen at the scene of the offense. During the trial, on cross-examination of State's witness Officer Robert McFerrin, the defense counsel asked about any information which had been received regarding Jerry Porter. McFerrin testified that he had received information from an informant that Jerry Porter was seen in the vicinity of Austin's Food Store at approximately 10:00 p.m. on the night of the offense. The informant described Porter as wearing khaki pants, a brown coat, and a white shirt; this description apparently matched the description of the killer which had been run in the local newspaper following the murder. The informant further stated that Porter was carrying a sack of coins and paper money on that night.

On redirect examination, the prosecutor asked Officer McFerrin why no charges had ever been brought against Jerry Porter, and the witness testified that the police discovered that the informant was Porter's ex-girlfriend, who later admitted that she had lied about the identification in order "to get even" with Porter. Officer McFerrin testified that, after investigating Porter, they discovered that he had been in Sylacauga on the night of the murder.

Although the appellant argues that Officer McFerrin's testimony on redirect examination concerning the recanting of the informant's identification of Porter, violated his right of confrontation and was inadmissible hearsay, we note that the appellant "opened the door" for

the introduction of this testimony by eliciting testimony from Officer McFerrin as to what the informant had told him concerning Jerry Porter. See *Ringer v. State,* 489 So.2d 646, 652 (Ala.Cr.App.1986); *Loyd v. State,* 580 So.2d 1370 (Ala.Cr.App.1990), reversed on other grounds, 580 So.2d 1374 (Ala.1991); *Hollingsworth v. State,* 549 So.2d 110 (Ala.Cr.App.1988); *Campbell v. State,* 508 So.2d 1186 (Ala.Cr.App.1986). See also *Garrett v. State,* 580 So.2d 58 (Ala.Cr.App.1991) ("[t]he record reveals that the appellant opened these matters up during cross-examination; therefore, they were properly within the scope of the State's re-direct examination").

Moreover, the appellant failed to object to this testimony at trial and, even if the testimony was hearsay, its admission does not rise to the level of plain error as defined by Rule 45A, A.R.App.P. See *Ex parte Womack,* 435 So.2d 766, 769 (Ala.1983), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983); *Ex parte Harrell,* 470 So.2d 1309, 1313 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985); *Ex parte Watkins,* 509 So.2d 1074 (Ala.1987), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

XIII

The appellant argues that he was denied a fair trial by the prosecutor's impeachment of the appellant's wife, Sonya Smith McWilliams, through an incriminating prior inconsistent statement, without producing the witness to whom the statement was allegedly made. The record indicates that the appellant, his pregnant wife, and their

child were staying in the apartment of Cynthia Love at the time of the offense. Cynthia Love had been a good friend of the appellant's wife. On cross-examination of the appellant's wife, the following occurred:

> "[PROSECUTOR]: Now, there at the time when you returned the key, I will ask you at that time and place, if you would have made this statement to [Cynthia Love]: that you were on the telephone across from the apartment, and that James [the appellant] went across the street to Austin's Convenience Store. Did you make that statement to Cynthia Love there at that time and place?
>
> "[APPELLANT'S WIFE]: No, I did not."

The appellant did not object to this remark, but later made a motion for mistrial based on the prosecutor's question. The prosecutor submitted that Cynthia Love had been subpoenaed as a State's witness and that she had been reliable in the past. The prosecutor testified that Cynthia Love never appeared to testify and therefore was never called to impeach the appellant's wife. The trial court subsequently instructed the jury as follows:

> "Before we begin the arguments of counsel, ladies and gentlemen, I want to give you this instruction: the State has attempted to impeach Sonya Smith McWilliams [the appellant's wife] by showing prior inconsistent statements made to Cynthia Love. Cynthia Love has

not testified to those statements, and thus Sonya McWilliams has not been successfully impeached. I instruct you ladies and gentlemen that you cannot consider statements allegedly made to Cynthia Love and denied by Sonya Smith McWilliams in weighing the credibility of Sonya McWilliams."

"It is generally agreed that, when a witness is called to testify to a material issue in the case, the party against whom the witness is called may impeach his credibility by proving that he has previously made statements that are inconsistent with his present testimony. These prior statements of self-contradiction can be introduced either through the cross-examination of the witness or, under limiting rules . . . by introducing other witnesses who will testify to the inconsistent statement."

C. Gamble, *McElroy's Alabama Evidence*, § 155.02(1) (4th ed. 1991).

"When a witness, on cross-examination, denies that he made a statement out of court which is inconsistent with his testimony on direct examination, the only available move for the impeaching party is to bring on an impeaching witness who can testify as to the prior inconsistent statement of the witness being impeached."

C. Gamble, *McElroy's Alabama Evidence,* § 157.01(1) (4th ed. 1991). Although the prosecution laid a proper predicate for the impeachment of the appellant's wife through her prior inconsistent statements made to another witness, because the other witness (Cynthia Love) never testified, the appellant's wife was never impeached.

Moreover, the prosecutor's testimony at trial establishes that he intended to produce the testimony of Cynthia Love. The following transpired following the defense counsel's motion for mistrial:

> "[PROSECUTOR]: The witness obviously is not available, Judge, but I was assured last night—I talked to two people, both of whom claimed to be the mother of Cynthia Love. I think I determined which one was the correct one, and that one told me that she felt very certain that she would be able to have Cynthia here this morning at 9:00. I assured her that we would try to pay her expenses or whatever. There is no way I could know whether she was going to appear here or not. Now, she obviously did not appear. I don't know where she is; she was under subpoena.
>
> "[ASSISTANT PROSECUTOR]: And our impeaching of her was just not done arbitrarily, Your Honor. We had had a statement taken by Ms. Cynthia Love; we have been in contact with Ms. Love, and Ms. Love has been here, was under subpoena, and told that we may need

> her in rebuttal on these particular facts that were brought out in court. And we did have statements and the things that were offered in impeachment of Mrs. Sonya Smith McWilliams [were] done in good faith. And our witness just didn't pan out, just didn't show up."

"It is becoming increasingly clear that one does not have an unbridled and absolute right to ask about a prior inconsistent statement. Rather, the cross-examiner must have some reasonable grounds and good faith upon which to believe that such a statement was in fact made." C. Gamble, *McElroy's Alabama Evidence,* § 156.01(7) (4th ed. 1991), citing *Wysinger v. State,* 448 So.2d 435 (Ala. Cr.App.1983).

Because of Cynthia Love's unavailability, the appellant's wife was not impeached. Also, because she denied having made the statement, any possible prejudice to the appellant was lessened. Moreover, because the prosecutor provided evidence that he undertook the impeachment in good faith and that he had reasonable grounds to believe that Cynthia Love would be present to testify as to the prior inconsistent statement, and also, in light of the trial court's instructions to the jury, we find no prejudice to the appellant as a result of the prosecutor's statements.

XIV

The appellant argues that the trial court interfered with his right to confront his accusers because he was not

allowed to impeach an inmate informant by questioning him about his decision to cooperate with the authorities in this case. Two inmates who had been incarcerated with the appellant following his apprehension in Ohio testified for the State, concerning statements which the appellant had allegedly made to them while he was in prison. One of the witnesses, Ronnie Hands, testified on cross-examination as follows:

> "When you talked to Investigator Helm and told him you didn't know anything, and you went back and talked to Anthony Finn [the other inmate] did you tell Anthony Finn what they wanted?
>
> "A. I just told him they was asking questions about him.
>
> "Q. About [the appellant]?
>
> "A. Yeah.
>
> "Q. You told Anthony Finn that?
>
> "A. Yeah.
>
> "Q. What else did you tell him?
>
> "A. That's it.
>
> "Q. Did Anthony say he was going to talk to somebody?

"A. He didn't say.

"Q. You and Anthony didn't talk?

"A. Probably. Not really, no.

"Q. And you knew that [the appellant] had come from Alabama? Right?

"A. Well, I didn't know until he told me.

"Q. Well, he told you he had come from Alabama? Right?

"A. Yeah.

"Q. And you got all this information from [the appellant]? Right: that you have testified to?

"A. Yeah.

"Q. And you didn't get any of it from Anthony Finn?

"A. No.

"Q. And you and Anthony Finn never talked about what was said by [the appellant]?

"A. No.

"Q. You never compared notes about what you knew?

"A. No."

Thereafter, on cross-examination of the other inmate, Anthony Finn, who actually shared a cell with the appellant, the following transpired:

> "Q. Did you have occasion to talk with Ronnie Hands about the prosecution wanting some information about [the appellant]?
>
> "A. Yes.
>
> "Q. And when you talked to him, what did he tell you?
>
> "[PROSECUTOR]: We object to hearsay, Your Honor.
>
> "THE COURT: Sustained.
>
> "[DEFENSE COUNSEL]: Your Honor, Mr. Hands testified he never had a conversation.
>
> "[PROSECUTOR]: No, he didn't. He said he did talk to him, Your Honor, and we would object to the nature of any content of any conversation as hearsay.
>
> "[DEFENSE COUNSEL]: Judge, how am I supposed to impeach Mr. Hands, if I don't know what they said?

"THE COURT: I will sustain.

"[DEFENSE COUNSEL]: We except, Your Honor."

The appellant argues that there was evidence that both inmates received lighter sentences because of their cooperation in this case and that, through this questioning, the appellant sought to produce evidence that the two inmates had fabricated their stories so as to receive this beneficial treatment. The appellant argues that the trial court's sustaining of the prosecutor's hearsay objection limited his ability to impeach the inmates. The appellant also argues that the alleged conversation was not hearsay because it was offered for the purpose of impeachment. However, the record indicates that immediately following the trial court's sustaining of the prosecutor's objection and the defense counsel's exception to the trial court's ruling, defense counsel was allowed to ask the following:

"Q. Did you ever talk to Ronnie Hands about the things that [the appellant] said to you or to him?

"A. No.

"Q. You never talked to him about that.

"A. No."

Thus, the defense counsel was allowed to rephrase his question so that it was not as broad, and he received an answer to his question. Therefore, even if the hearsay

testimony should have been allowed for the limited purpose of impeachment, any error was harmless, because the defense counsel was allowed to elicit an answer concerning this question. See *Walker v. State*, 581 So.2d 570 (Ala. Cr.App.1991) (wherein defense counsel's question, which was preliminary step to impeachment, should have been admitted; however, the error was harmless). Moreover, based on the defense counsel's formulation of the initial question we do not find that the trial court abused its discretion in sustaining the prosecutor's objection. See C. Gamble, *McElroy's Alabama Evidence* § 21.01(1) (3), (4th ed. 1991).

XV

The appellant argues that the trial court denied the appellant the effective assistance of counsel by overruling an objection to the testimony of prison inmates concerning the appellant's confession, without determining whether the inmates were agents of the State. There is no indication in the record that either inmate was working as an agent of the police. There was further evidence that none of the Alabama officials had promised the inmates anything in return for their testimony. However, there was an indication that certain charges were lessened or dropped against these inmates by the Ohio officials in return for their testimony. The record indicates that these arrangements were made after the appellant had been transferred and after he had made the confessions to the inmates.

Appendix E

During the testimony of one of the inmates, defense counsel objected, citing *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Although the trial court overruled the objection, the prosecutor subsequently asked the inmate whether he had coerced or threatened the appellant or had promised anything in return for making this confession. The inmate stated that he had not.

> "'[W]hen an accused volunteers a confession to a person who is not a law enforcement official or agent and has no connection whatever with law enforcement authorities, who has no interest whatever in the prosecution of the accused, is not in a position to promise or give the accused anything to compensate for his confession or to harm him for not making a confession, and there was no occasion whatever on the part of the person to whom the confession was made to have threatened the defendant if he did not confess or to make him any promise if he did confess, the confession under such circumstances is voluntary and admissible in evidence. *Ellis v. State*, Ala.Cr.App., 338 So.2d 428, 432 (1976); *Kircheis v. State*, 56 Ala.App. 526, 323 So.2d 412 (1975), *cert. denied*, 295 Ala. 409, 323 So.2d 421.'

"*Primm v. State,* 473 So.2d 547, 553 (Ala.Cr.App.1984). See also *Warrick v. State,* 460 So.2d 320, 323 (Ala. Cr.App.1984); *Hinshaw v. State,* 398 So.2d 762, 764 (Ala. Cr.App.), *cert. denied,* 398 So.2d 766 (Ala. 1981)."

Jackson v. State, 502 So.2d 858, 862 (Ala.Cr.App.1986).

Because the statement was voluntarily made to persons who were not law enforcement officers or agents, the appellant was not entitled to counsel or constitutional warnings prior to making his statement. *McCall v. State,* 501 So.2d 496, 500 (Ala.Cr.App.1986); *Jackson v. State,* supra, and cases cited therein.

XVI

The appellant argues that he was denied a fair trial because of improper comments made by the prosecutor during his closing argument at the guilt phase. The appellant refers to the following arguments made by the prosecutor:

> "I can assure you, I believe all of us in this room believe that this is real, and the gun in this case, which you have seen, that is real; the slacks which you have seen, that's real, showing the evidence of the semen—that's real; the only thing that is not real here today is Patricia Vallery Reynolds. She is, unfortunately, not here today, our best witness. The only evidence we have of her is her clothing, her key chain, and that picture (indicating). I wish she were

here today with her family, and could testify about what happened. But she is not, and that is why we are here."

"Both of them talk about, they keep saying that our witnesses picked out Jerry Porter, and that they identified Jerry Porter. That's not correct, now, and you heard the evidence. They said it looked like him, but none of them said it was him: not a single one of them. They all said yes, that looked very much like him. And when you—

"[DEFENSE COUNSEL]: I am going to object to that as a misstatement of the evidence. The evidence was that they—the testimony was that they tentatively identified him as the one who was in the store. That was exactly what the officer testified to concerning Mr. McDaniel.

"THE COURT: The jury is aware of the evidence. I will note your objection."

"[PROSECUTOR]: Now, [Defense Counsel] attacked our witnesses: Marsh, Thomas. He talked about the Porter case, and the friends supposedly alibiing. The Tuscaloosa County Homicide Unit investigated that case thoroughly, and they concluded conclusively that that man had nothing to do with it.

"[DEFENSE COUNSEL]: I am going to object. There's no evidence of any conclusive determination by any homicide investigation.

"THE COURT: I will note your objection.

"[DEFENSE COUNSEL]: Could I have a ruling?

"THE COURT: Overruled."

"[PROSECUTOR]: He was going north. Why? Because he was fleeing from the crime; it looked like things were focusing in on him; he was not supposed to have been a suspect until Investigator Rester's card turns up on his door. And he is afraid that now he is a suspect. And the brown coat, he said, 'where is it?' Well, of course, we know that Trooper Elder didn't take the clothing he was wearing. It was cold up in Ohio in January, so he got his clothes back. He had to have gotten those.

"[DEFENSE COUNSEL]: I am going to object to that as not being a correct statement of the evidence, Your Honor.

> "THE COURT: Again, the Court doesn't make rulings on the evidence. That is up to the jurors."

> "[PROSECUTOR]: And as to what happened to the khaki pants, I don't know. But I suspect they had blood on them. I suspect that he got rid of them."

"All right, sir. And of course as far as printing the gun, this Defendant wasn't even a suspect for several weeks. They didn't know to print the gun. I think it was obvious that Sonya intended to be misleading and untruthful. And that's why I cross-examined her about what she could see from that phone to the apartment. She was trying to tell you that she was there on the phone and could see the door the whole time, and that she could have seen him come and go. But when I showed her obvious physical evidence, she admitted that she was not correct. And as for what Sonya told Chief Miller as to when this Defendant had the gun in Mobile, they were talking about in context of this crime, and—

"[DEFENSE COUNSEL]: Your Honor, I am going to object again. There is no evidence as to when that reference was to. I specifically asked Investigator Miller; he said there was no way he knew. I object; that is a misstatement of the evidence.

"[PROSECUTOR]: It is a fair inference.

"THE COURT: The jury is aware of the evidence."

The above-quoted prosecutorial comments were proper inferences or conclusions drawn from the evidence. The prosecutor could properly conclude the victim was dead, that Jerry Porter was never positively identified, that the information pertaining to Jerry Porter had been investigated and that the police had determined that Porter was in Sylacauga on the night of the murder, that the appellant might have gotten rid of the khaki pants and brown coat which he was seen wearing on the night of the offense, and that the appellant's wife was untruthful in testifying that she was able to see the apartment from the telephone booth.

"[PROSECUTOR]: He talked about the fingerprints. You know I didn't hear any mention of Jerry Porter's fingerprints in that story either. You heard the officers say that they rarely ever are able to get prints in a robbery. Certainly they are going to have a lot of prints because people work there day in and day out.

"[DEFENSE COUNSEL]: Your Honor, I object to that as misleading the jury. There is no evidence Jerry Porter's fingerprints were ever sent for comparison.

"THE COURT: Sustained."

Appendix E

As to the prosecutor's comment concerning the lack of evidence of any of Jerry Porter's fingerprints being found in Austin's food store, there was no evidence introduced that any of Jerry Porter's fingerprints were found or even sought out for purposes of comparison. The trial court sustained defense counsel's objection and, although it gave no curative instructions, we do not find that the prosecutor's argument was so unreasonable as to amount to plain error. *Dixon v. State,* 476 So.2d 1236 (Ala.Cr.App.1985) (prosecutor's argument attempting to inject criminal record of defense witness into evidence was cured by trial court's sustaining of objections and giving instructions to the jury that there was no evidence of prior criminal conduct of the witness). See also *Holladay v. State,* supra, at 131, quoting *Bui v. State,* supra (wherein it was held that improper prejudicial statements are generally considered eradicated when the trial court sustains the defendant's objection or gives curative instructions or both).

> "[PROSECUTOR]: Now, I submit to you that we have proven beyond a reasonable doubt, the evidence on each of the counts of the indictment that you will have before you. When I talk about reasonable, defense attorneys sometimes would have you believe that that is with certainty. That is not what the law says, and I would ask you to listen when the Court explains the applicable law to you. Reasonable doubt is simply a doubt for which you can give a good reason: not conjecture, speculation. Sure, you could speculate about all kinds of things, but

you should make your decision based only on the evidence that you have heard. The burden of proof in this case is the same in any case when the State has prosecuted. And that burden is overcome every day. Obviously people commit crimes, and people get convicted of them. It is like the Scales of Justice. I know all of you have seen that. We have to balance those scales. It is not overcoming the burden of proof for the State; it is not some impossibility."

"And the people's rights, now, need to be enforced; people have a right to live free from crime and criminals. It is time for you to fulfill your obligation.

"[DEFENSE COUNSEL]: Judge, we are going to object to this line of argument as being illegal [based] on the cases cited by the Eleventh Circuit.

"THE COURT: I will sustain.

"[PROSECUTOR]: All right, sir. I would like to ask you to think about this for a minute. We have talked about all of the witnesses except one. Unfortunately she is not a witness in body. But imagine, if you will, how Patricia Vallery Reynolds felt. You know, we are here in a rather sterile, sometimes it may seem cold atmosphere of the courtroom. But it is abstract: we can sit back and look and see what happens,

> and think about it, talk about it, and so forth. But the crime happens within the hot lights of violence. And I wonder how she felt that night? The fear—
>
> "[DEFENSE COUNSEL]: Your Honor, I am going to object. This is pleading sympathy from the jury; it is not proper, and we do object.
>
> "THE COURT: Sustained."

The prosecutor's comments concerning the jury's obligation and "justice" were proper comments as an appeal by the prosecutor for law enforcement. See e.g. *Ex parte Waldrop*, 459 So.2d 959, 961-62 (Ala.1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Allen v. State*, 462 So.2d 1031, 1035 (Ala. Cr.App.1984). The appellant argues that this summation by the prosecutor was a "patently improper emotional appeal" ; however, this court has upheld similar comments during a prosecutor's closing. See e.g. *Rutledge v. State*, 523 So.2d 1087 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988); *Lewis v. State*, 456 So.2d 413 (Ala.Cr.App.1984).

> "[PROSECUTOR]: You know one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the arm rest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk

> about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show you any other explanation for it."

The appellant objects to the above-quoted comment, alleging it constituted a comment on his failure to testify. No objection was made to this comment at trial.

> "'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.' Ex parte Kennedy,* 472 So.2d [1106] at 1111 [(Ala.1985)](emphasis in [Kennedy]). 'This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright,* 778 F.2d 623, 629 n.6 (11th Cir. 1985), *cert. denied,* 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the

> fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler,* 792 F.2d 1528, 1535 (11th Cir.), *cert. denied,* 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986). See also *Biddie v. State,* 516 So.2d 837, 843 (Ala. Cr.App.1986), *reversed on other grounds,* 516 So.2d 846 (Ala.1987)."

Kuenzel v. State, 577 So.2d 474, 489 (Ala.Cr.App.1990).

> "'In evaluating a claim that the prosecutor's statement amounted to a comment on the defendant's failure to testify, "the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."' *Brinks v. State,* 500 So.2d 1311, 1314 (Ala.Crim.App.1986) (quoting *McKissick v. United States,* 379 F.2d 754, 757 (5th Cir. 1976)). See also *Marsden v. Moore,* 847 F.2d 1536 (11th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *Daly v. State,* 442 So.2d 143 (Ala.Crim. App.1983)."

Owen v. State, 586 So.2d 958 (Ala.Cr.App.1990).

While we are mindful of the similarity between this comment and the prosecutorial comment made in *Windsor v. State,* 593 So.2d 87 (Ala.Cr.App.1981), in that case, the

prosecutor commented, while pointing at the appellant, that "he cannot explain why he had the deceased's pistol in his possession at the time of his arrest." Defense counsel vigorously objected to the comment and noted that the prosecutor had pointed at the defendant or the table at which the defendant was seated when he made this statement. This gesture emphasized the defendant's role as the only and obvious party to properly refute the evidence.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. *Whitlow v. State,* 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State,* 448 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State,* 404 So.2d 89, 97 (Ala.Cr.App.1980), *cert. denied,* 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel and argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984); *Sanders v. State,* 426 So.2d 497, 509 (Ala.Cr.App.1982)."

Bankhead, supra. See also *Duren,* supra.

As this court noted in *Windsor,* supra, the Alabama Supreme Court has indicated that a prosecutor's comment on a defendant's failure to testify is subject to the harmless error rule. *Id.,* citing *Ex parte Wilson,* 571 So.2d 1251, 1265 (Ala. 1990). In light of the prosecutor's entire argument, we do not believe that the comment made in the case was intended to be a reference to the appellant's silence or that the jury "would naturally and necessarily" consider it to be a comment on the appellant's failure to testify. *Owens v. State,* supra. Moreover, we do not believe that this comment constituted plain error such that "when examined in the context of the entire case, [this error] is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler,* 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933,107 S.Ct. 407, 95 L.Ed.2d 359 (1986).

XVII

The appellant argues that all of the physical evidence which was seized from him by the Ohio police, as well as the statement taken when he was in custody, should have been suppressed because, he argues, this evidence was the fruit of an illegal arrest. The record indicates that an Ohio State Trooper testified at trial that, in the early morning of January 3, 1985, he drove into a rest area, where he observed a parked vehicle, which he noticed because the trunk lock had been punched out. The trooper checked the vehicle's tag number and determined that the vehicle had been reported as stolen, according to a NCIC report. The trooper intended to wait for other officers

to arrive; however, the vehicle's back-up lights came on and the car began to back out of the parking slot. The trooper testified that he then immediately approached the vehicle with his weapon pointed at the appellant, and instructed the appellant to put his hands up. The trooper told the appellant why he was being stopped, and the appellant hesitantly followed the trooper's instructions. The trooper testified that the appellant stated that the vehicle he was in belonged to his uncle and that his uncle had been accompanying him in another vehicle, which had been parked next to him. He told the trooper that his name was Rufus Williams and that he was born on July 7, 1958. When asked how old he was the appellant stated that he was 23 years old; the trooper stated that the dates did not add up properly. The trooper asked for further identification. The appellant stated that he had none and the trooper asked if he carried a wallet. The appellant presented his wallet, and the trooper found a social security card belonging to Anthony G. Crawford, whom the appellant and his wife had visited in Tuscaloosa. The appellant then stated, "I lied to you; that's me. I am not Rufus Williams." The trooper testified that thereafter he performed an administrative inventory search of the vehicle, pursuant to the standard procedure of the Ohio Highway Patrol and, that upon entering the vehicle, he immediately observed a .38 caliber Smith & Wesson handgun underneath the arm-rest. He further found a box of .38 special cartridges and he also found bullets on the appellant's person. The appellant stated that the gun belonged to his uncle.

Appendix E

The basis for the appellant's objection to the arrest is the trooper's report wherein it states that, he "got an NCIC hit on the car, also says he then arrested the defendant. And he then verified that the car was stolen."

The appellant's arrest was proper as the trooper had sufficient probable cause to a conduct a warrantless arrest. Although the State seems to argue that the appellant was merely being detained and questioned under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it is clear that, when the trooper approached with a drawn gun, which he pointed at the appellant, telling him to raise his hands, the appellant was under arrest. See e.g. *Jordan v. State*, 549 So.2d 161 (Ala.Cr.App.1989). The trooper had sufficient probable cause based on his observation that the "trunk lock was punched," that is, that the trunk lock had been removed, that the vehicle had an Alabama license plate and was present at approximately 2:00 a.m. at a rest area in Ohio and that the file check of the vehicle showed that it was entered into NCIC as stolen. See e.g. *Bryant v. City of Gadsden*, 574 So.2d 919, 920-21 (Ala.Cr.App.1990) (an officer may rely upon a police radio broadcast to stop and arrest a suspect where the officer also had "'a particularized and objective basis for suspecting the [defendant] of criminal activity.'" *Id.*, quoting *Ex parte Betterton*, 527 So.2d 747, 749 (Ala. 1988)). Therefore, because the appellant's arrest was proper, the evidence seized from the vehicle was taken incident to a lawful arrest, *Manning v. State*, 568 So.2d 327 (Ala. Cr.App.1990), and subsequent inventory search, and his confession was not to be excluded, because it was not the fruit of an illegal arrest. *Williams v. State*, 565 So.2d 1233 (Ala.Cr.App.1990).

Appendix E

XVIII

The appellant argues that John Stephens's identification of him should have been suppressed because it was induced by a suggestive lineup. The appellant bases his argument on the fact that John Stephens, a State's witness, picked the appellant out of a photographic array, wherein the appellant states that he was the only suspect who was displayed against a red background and the only suspect who held a plaque under his chin that said "Jefferson County Jail." The record indicates that the appellant's picture was framed during the array, so that only part of the wording, if any, was visible when Stephens viewed it. The record indicates further that the background of the photograph was red, because the photograph was taken at the Jefferson County jail. Furthermore, the record indicates that all of the pictures were distinct in some way, in that some of them had numbers on them, and some of them had height marks behind the individual. The State presented evidence that no suggestions were made by the police to Stephens as to making his identification.

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. [377], at 384, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 [at 971] (1968). While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning

> the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972).

Even if the photographic array could have been said to be unduly suggestive, the in-court identification by Stephens was clearly independently reliable. "'[W]hether eyewitness identification evidence which ensues from a pre-trial identification procedure is constitutionally infirm requires a two-step inquiry. First, it must be determined whether the pre-trial identification procedures were unduly suggestive. . . . If so, then the suggestiveness of the identification procedures must be balanced against factors indicating that the in-court identification was independently reliable.' *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir. 1982)." *Hull v. State*, 581 So.2d 1202 (Ala. Cr.App.1990). "In *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) the United States Supreme Court set out certain factors to be considered in evaluating the reliability of an identification. These factors, as reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977), include 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention,

the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" *Hull v. State*, supra. Each case is to be decided pursuant to a totality of the circumstances review. *Manson v. Brathwaite*, 432 U.S. at 110, 97 S.Ct. at 2251.

In the present case, the record indicates that the witness, John Stephens, lived in the same apartment complex as Cynthia Love and that he spoke to the appellant on two occasions while he was staying at the apartment. He first saw the appellant as he was carrying belongings into the apartment of Cynthia Love. The witness testified that he asked the appellant if he knew Cynthia Love, and that the appellant responded that he did and commended the witness for looking out for her. The witness again spoke to the appellant for a more extended period of time, after the police began investigating the crime. The witness testified that he observed the appellant with another man in a vehicle. He called the appellant over to his apartment and the appellant responded. He informed the appellant that the police had been looking for both the appellant and his wife in connection with the investigation of the offense. The appellant responded that he was concerned for his wife's welfare, with such a criminal on the loose. The witness then attempted to get some beer from the appellant; however, the appellant indicated that he had none. The witness also testified that he observed the appellant, prior to the latter conversation, fumbling with keys and apparently attempting to enter or lock Cynthia Love's apartment. The witness testified that this occurred possibly on the night of the offense. The witness was very specific and accurate in his descriptions of the appellant. It

is further evident that the witness identified the appellant with a high level of certainty.

Based on the above, we find that the witness's identification of the appellant was reliable.

XIX

The appellant argues that the identification of him made by witnesses Howard Marsh, Ronnie Thomas, and Steven McDaniel should have been suppressed because he was denied his right to have retained counsel present when these witnesses identified him in a lineup. The record indicates that these three witnesses all saw the perpetrator of the offense in Austin's food store on the night in question. Thereafter, on February 21, 1985,[3] a pre-indictment lineup, which included the appellant, took place wherein all three witnesses positively identified him as the man that they had seen in Austin's on the night of the murder. The record indicates that the appellant's court-appointed attorney was present at the lineup. However, at the suppression hearing, the appellant argued that he had retained another attorney to work on his case in addition to his appointed attorney and that he had requested the presence of this attorney at the lineup, but that his request was refused.

However, "[a] defendant does not have a constitutional right to have counsel present at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d

3. The appellant was not indicted until May 3, 1985.

411 (1972); *Franklin v. State*, 424 So.2d 1353 (Ala.Crim. App.1982), *cert. denied*, 424 So.2d 1353 (Ala.1983); *Tankersley v. State*, 448 So.2d 486 (Ala.Crim.App.1984); *Fisher v. State*, 439 So.2d 176 (Ala.Crim.App.), *cert. denied*, 439 So.2d 176 (Ala.1983)." *Johnson v. State*, 526 So.2d 34, 38 (Ala.Cr.App.1987). See also *Hollingquest v. State*, 552 So.2d 1078 (Ala.Cr.App.1989). Moreover, the appellant in fact had counsel present. All three witnesses, furthermore, stated that they were absolutely certain that the appellant was the man that they had seen. The appellant argues that, because two of the witnesses had previously tentatively identified Jerry Porter as the man whom they had seen, their identifications were unreliable. However, the record is clear that these two witnesses' identifications of Porter were in fact tentative, and that they stated that Porter simply looked like the man whom they had seen. Therefore, the trial court properly overruled the appellant's motion to suppress the identification of him made by these three witnesses.

XX

In accordance with § 13A-5-53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error which adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Appendix E

The trial court properly found the existence of three aggravating circumstances: that the appellant had previously been convicted of another felony involving the use or threat of violence to the person, § 13A-5-49(2); that the crime was committed during a robbery and a rape in the first degree, § 13A-5-49(4); and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A-5-49(8). The trial court found the existence of no statutory or nonstatutory mitigating circumstances.

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. For murder during robbery, see *Kuenzel v. State,* supra; *Henderson v. State,* 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991); *Stephens v. State,* 580 So.2d 11 (Ala. Cr.App.1990), affirmed, 580 So.2d 26 (Ala.1991); *Tarver v. State,* 553 So.2d 631 (Ala.Cr.App.1989), affirmed, 553 So.2d 633 (Ala.1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 966 (1990). For murder during rape in the first degree, see *Freeman v. State,* 555 So.2d 196 (Ala.Cr.App.1988), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990); *Bradley v. State,* 494 So.2d 750 (Ala.Cr.App.1985), affirmed, 494 So.2d 772 (Ala. 1986), cert. denied, 480 U.S. 923 (1987), 107 S.Ct. 1385, 94 L.Ed.2d 699; *Thompson v. State,* 542 So.2d 1286 (Ala.Cr.App.1985), affirmed, 542

So.2d 1300 (Ala.), cert. denied, 493 U.S. 874 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).

Because the appellant's conviction and sentence of death are proper, the judgment of the circuit court is affirmed.

AFFIRMED

PATTERSON, P.J., and TYSON, McMILLAN, JJ., concur.

BOWEN J., dissents with opinion, TAYLOR, J., joins in dissent.

Appendix E

DISSENT

BOWEN, Judge, dissenting

I dissent from Part XVI of the opinion of the majority. The appellant here, like the accused in *Windsor v. State*, 593 So.2d 87 (Ala.Cr.App.1991), was apprehended after the commission of the capital offense with the murder weapon in his possession. The prosecutor here, like his counterpart in *Windsor,* reminded the jury that no explanation had been given for the accused's possession of the weapon. The argument in *Windsor* was as follows:

> "[Defense counsel] just glossed over this . . . . [T]hey can't explain this—they can't explain why this weapon was in the defendant's pocket when he was arrested. Can you offer me another reasonable hypothesis as to how that weapon got there?"

The argument here was:

> "[N]either of the defense attorneys have talked about . . . . that gun in that car right beside the man underneath the arm rest . . . and they did not talk about the bullet in his pocket. . . . Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, *and you have not heard an explanation;* the evidence doesn't

show you any other explanation for it."

A "'statement by a prosecuting attorney to the effect that the evidence for the state is uncontradicted or undenied is not a comment on the defendant's failure to testify unless the defendant himself is the only one who can contradict or deny the evidence. *Williams [v. State],* 461 So.2d [834] at 843, [(Ala. Cr.App.1983), reversed as to result, *Ex parte Williams,* 461 So.2d 852 (Ala.1984)]." *Stain v. State,* 494 So.2d 816, 817 (Ala.Cr.App.1986).

Like the accused in *Windsor,* the appellant here was the only one who could have explained his possession of the murder weapon. Therefore, the argument here, like the argument in *Windsor,* constituted an indirect comment on the defendant's failure to testify because the prosecuting attorney "by an indirect reference . . . virtually identif[ied] the defendant as the person who did not take the stand." *Ex parte Williams,* 461 So.2d at 854.

This court reversed the conviction in *Windsor,* yet the majority affirms here. It justifies the different results in these two cases, decided just four months apart, by noting that in *Windsor,* (1) the prosecutor "pointed" to the accused when he made the comment, and (2) the defense objected to the comment. Here there was no pointing and no objection. Neither the lack of "pointing" nor the lack of an objection is sufficient to distinguish this case from others, including *Windsor,* which have been reversed for indirect prosecutorial comments on the accused's failure to testify.

Appendix E

The majority makes too much of the "pointing" in *Windsor.* That physical gesture was superfluous because the defendant there, just like the appellant here, was the only one who could have been expected to explain his possession of the murder weapon. Under the facts of *Windsor* (which, for present purposes, are identical here), the prosecutor's *words* "close[ly] identifi[ed]. . . the defendant as the person who did not become a witness." *Ex parte Wilson,* 571 So.2d 1251, 1261 (Ala. 1990). The accompanying gesture added little or nothing to the prosecutor's verbal invitation to hold the accused responsible for failing to refute the State's evidence.

It is true that in both *Ex parte Wilson* and *Windsor v. State,* cited in the majority opinion, there were defense objections to the alleged comments on failure to testify. However, both *Wilson* and *Windsor* relied on *Ex parte Williams,* supra, a "plain error" case in which there was no objection to the prohibited comment. See *Williams v. State,* 461 So.2d at 843.

Because we found a virtually identical prosecutorial comment to be error in *Windsor,* there is no question that *this* comment was error. "'Error' is 'plain error'. . . when it 'has or probably has adversely affected the substantial rights of the [defendant],' Rule 39(k) [and Rule 45A], A.R.App.P., and plain error is to be acted upon 'in the same manner as if the defendant's counsel had preserved and raised [the] error for appellate review.' *Johnson v. State,* 507 So.2d 1351, 1356 (Ala. 1986)." *Ex parte White,* 587 So.2d 1236 (Ala. 1991). The error here was "plain" because it affected the rights of this appellant in the same

way as the error affected the accused, under very similar circumstances, in *Windsor*.

I dissent because I believe that if *Windsor* were correctly decided and should have been reversed, then this conviction should also be reversed.

APPENDIX F — JUDICIAL SENTENCING ORDER, DATED OCTOBER 16, 1986

Case No. CC-85-437

STATE OF ALABAMA

vs.

JAMES EDMOND MCWILLIAMS, JR.

SPECIFIC FINDINGS

This cause having been heard in open court on October 9, 1986 for determination of the sentence to be imposed herein, after the sentence hearing or punishment phase had been conducted, and after the jury had returned an advisory verdict, and the Court having ordered and received a written pre-sentence investigation report, and the parties having been given a copy of said report and been given the opportunity to respond to it and to present evidence to the Court about any part of it, and said report having been made a part of the record in this case, and the parties having been permitted to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed and any other evidence; and the Court having considered the evidence presented at trial and re-submitted during the sentence determination hearing, the evidence presented during the sentence hearing and re-submitted, the recommendation of the jury contained in its advisory verdict, the pre-sentence investigation report and evidence submitted in connection with it, other

evidence submitted by the parties, and the arguments of the parties; the Court hereby makes and enters the following findings:

THE CRIME AND DEFENDANT'S PARTICIPATION

The defendant, James Edmond McWilliams. Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.

Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.

Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

The defendant was identified by eyewitnesses who placed him at the scene.

Appendix F

The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio charged with Auto Theft, Possession of Stolen Property, Carrying a Concealed Weapon, and No Operator License. While in the Ohio jail, he bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty.

AGGRAVATING CIRCUMSTANCES

Pursuant to Code of Alabama, 1975, Section 13A-5-47(d), the Court proceeds to determine the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, Code of Alabama, 1975, as follows:

(1) "The capital offense was committed by a person under sentence of imprisonment."

This court finds this aggravating circumstance to be nonexistent and not an issue in the case.

(2) "The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person."

This Court finds from the evidence that this aggravating circumstance does exist. State's exhibit #102

introduced during the 2nd phase of the trial consists of certified copies of prior convictions of the defendant for the offenses of Robbery in the 1st Degree and Rape in the 1st Degree, said convictions being CC 85 545 and CC 85 546 respectively in the Circuit Court of Mobile County, Alabama, dated June 26, 1985.

(3) "The defendant knowingly created a great risk of death to many persons."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(4) "The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping."

This Court finds from the evidence that this aggravating circumstance does exist.

The defendant murdered Patricia Vallery Reynolds, while he was engaged in the commission of rape and robbery.

(5) "The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(6) "The capital offense was committed for pecuniary gain."

This Court finds this aggravating circumstance to be nonexistent and not an Issue in this case.

(7) "The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(8) "The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."

This Court does find from the evidence presented at trial that the capital offense was especially heinous, atrocious, or cruel compared to other capital cases.

This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery.

This finding is also based upon the behavior of the defendant during and immediately after this crime, his obvious lack of regard or compassion for the life and human dignity of the victim.

Appendix F

MITIGATING CIRCUMSTANCES

(STATUTORY OR OTHERWISE)

Pursuant to Section 13A-5-47(d) of the Code of Alabama, 1975 the court proceeds to determine the existence or nonexistence of mitigating circumstances enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52.

As to statutory mitigating circumstances:

(1) "The defendant has no significant history of prior criminal activity."

To the contrary, this Court finds from the evidence that the defendant does have a significant history of prior criminal activity as stated hereinabove and as shown in the record of arrest(s) contained in the written pre-sentence investigation report made a part of the record herein.

(2) "The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.

Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase,

however, after consideration of this evidence, this court finds that the preponderance of evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.

(3) "The victim was a participant in the defendant's conduct or consented to it."

This Court finds that there was no evidence presented that the victim participated in or consented to defendant's conduct, and that this mitigating circumstance does not exist.

(4) "The defendant was an accomplice in the capital offense committed by the another person and his participation was relatively minor."

This Court finds that there was no evidence presented that the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor, and that this mitigating circumstance does not exist.

(5) "The defendant acted under extreme duress or under the substantial domination of another person."

This Court finds that there was no evidence presented that the defendant acted under extreme duress or under the substantial domination of another person, and that this mitigating circumstance does not exist.

(6) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The Court finds that the preponderance of the evidence established that the defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law that this capacity was not substantially impaired, and that this mitigating circumstance does not exist.

(7) "The age of the defendant at the time of the crime."

The evidence presented as to the age of the defendant at the time of the crime varies from age 24 to age 27 with birthdates ranging from 11-10-57 to 11-10-60. This Court finds the age of defendant, in any event, not to be a mitigating circumstance.

In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its' advisory verdict to present any other evidence of mitigating circumstances, and to make any statement of mitigating circumstances. The defendant testified that he had received two blows to the head at various times and places, and that this resulted in some organic brain damage.

Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuro-psychological testing, and this request was granted.

Appendix F

This Court interprets Section 13A-5-47 of the Code of Alabama 1975 as limiting in what additional evidence may be presented in the third phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

Nevertheless, the Court reviewed additional evidence presented by the defense as to the results of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor-Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance.

CONCLUSION

All of the proper evidence having been received, the arguments given and statements made, the Court proceeds

to weigh the aggravating and mitigating circumstances and balancing these circumstances against each other.

The Court has determined the existence or nonexistence of each aggravating circumstance as it applies to James Edmond McWilliams, Jr. individually, and the Court has determined the existence or non-existence of each statutory enumerated mitigating circumstance and any other mitigating circumstance as it applies to James Edmond McWilliams, Jr., individually. The consideration given by the Court has been specifically directed to James Edmond McWilliams, Jr. as an individual and to the instant charge against him.

The Court finds the existence of three statutory aggravating circumstances as set out herein and further finds that no mitigating circumstances exist, either statutory or otherwise.

It is, therefore, the conclusion of this Court that the aggravating circumstances overwhelmingly outweigh the mitigating circumstances.

Accordingly, the Court accepts the recommendation of the jury in its advisory verdict that the penalty of death be imposed upon Edmond McWilliams, Jr.

Done this the 16th day of October, 1986.

/s/

J.B. Baird, Judge Presiding

APPENDIX G — SENTENCING HEARING TRANSCRIPT, DATED OCTOBER 9, 1986

[1404]SENTENCING HEARING

October 9, 1986; 10:30 a.m.

THE COURT: Are you ready to proceed, gentlemen?

MR. STEVERSON: The State is ready, Your Honor.

MR. FREEMAN: Yes, sir.

MR. SOGOL: No, sir, the Defense is not ready to proceed, Your Honor. I would like to state for the record the reason why.

THE COURT: All right. Go ahead, Mr. Sogol.

MR. SOGOL: Your Honor, prior to the trial of this case, Your Honor was advised, along with Mr. Freeman, that Mr. McWilliams had come up here from Holman Prison on an assortment of drugs that were prescribed for him by the prison authorities.

We had a discussion, as I recall, in chambers concerning the problems that might or might not cause during [1405]the course of the trial, and I agreed that it would not be a problem under that circumstance. But I would remind Your Honor that both you and Mr. Freeman were aware that he was taking certain drugs prescribed for him by the people at Holman.

As a result of that combination of drugs, which it was testified by Mr. McWilliams at the Sentencing Hearing, that it involved Melloril, Desiril, and Librium, we subpoenaed from the Department of Corrections, Mr. McWilliams' records. That was in August of this year. In September of this year, the records had not been provided to The Court by the subpoena. I filed a motion to show cause why the Department of Corrections should not be held in contempt. That was set down to be heard contemporaneously with the sentencing hearing that was scheduled for the 1st of October. Due to a death in my family, I had to be in Wisconsin at that time, and that hearing was put over to today. Upon my return from Wisconsin, I inquired as to whether or not that material had been provided by the Department of Corrections, and I was told it had not. I believe Mr. Freeman, I and Your Honor met that following Thursday, and we pointed out that that material had not been provided to me by the Department of Corrections.

Since that time, both Mr. Freeman and myself have made every effort possible, I believe, to get the [1406]authorities with the Department of Corrections to provide those records. I have, and I would offer for the record, copies from the PDR of the drugs which Mr. McWilliams has testified and which the record will reflect that he is taking. That is: Librium capsules, Desiril, and Melloril.

Specifically under Melloril for indications from PDR, it says: (reading) "For the manifestations of psychotic disorders." That was the reason that we subpoenaed

the material from Holman from the Department of Corrections, the Board of Corrections. As of 5 o'clock yesterday, that material was not here. I have been advised by The Court that that material arrived this morning sometime. I have not had an opportunity to review that material other than briefly in Your Honor's office, where I pointed out to Your Honor that there were indications in there or references in there that there was no evidence of psychosis today; that I did not have time to go through all the records nor to have the records reviewed by anyone else. Since I am not a psychologist or a psychiatrist, as to whether or not there was a need to have the people from Holman present to testify as what caused them to prescribe antipsychotic medication for Mr. McWilliams. I have not had an opportunity to talk with those people nor review those records. They did not come in until this morning sometime. This hearing was scheduled at 10 o'clock this morning.

[1407]The second part of my inability to prepare today, deals with my request for certain tests to be run on Mr. McWilliams. After having someone privately review the Bryce records for me, I was advised that, based on the history and certain behavior patterns identified in the Bryce records themselves, that there was a possibility of some organic brain problem with Mr. McWilliams. I petitioned The Court for certain tests to be run. One test was run by someone at Holman, Dr. Bivens, who advised The Court in a letter which is in the file, that his test was inconclusive, but it left possible organic impairment, possible psychological impairment, or possible malingering. And he recommended private

evaluation of the remaining tests requested, since the Department was not able to run those tests and did not have adequate facilities. And he listed the names of 2 people in Mobile who he thought would be able to run the tests.

While I was gone, Mr. McWilliams was evidently transferred up here, and without my knowledge transferred back to Taylor Hardin where it is already testified he has a lawsuit pending against the facility and the staff, and further tests were run on him. The results of those tests were delivered to my office Tuesday afternoon. A Doctor Goff at Bryce, from my understanding--not at Taylor Hardin--had run the tests, and had reported some organic brain dysfunc-[1408]tion, as a result of the tests. I then Tuesday afternoon, asked Your Honor to send an order to Bryce, asking them for the records, on the basis of that conclusion.

I have here the records that were delivered by Bryce, subject to that order. The records contain no information concerning the tests run; they do not contain the tests; there is no way that I can evaluate or have someone else go behind and recheck the results found, which I think would be necessary in this case. Not that I impugn Doctor Goff in any way, but I feel that, given the nature of this case, that it is necessary on my part to have someone else review these findings. There is nothing in those records: no test results, no nothing, that would allow me to have anybody go along and review and determine the validity of his findings.

Because of those 2 things, we are unable to present any evidence today, although I think that there is indication that, at least at some point in time, based on the medications prescribed and the brief notes in the records, that someone has determined some psychotic behavior on the part of Mr. McWilliams. But we are unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing. And I would like to emphasize for the record that, in [1409]my opinion, both The Court and the District Attorney have done all they can to try to force, and I mean force, the Board of Corrections and the Department of Mental Health to provide this material for us, but that it seems to me at that time point in time that, because of their refusal, their disinterest, whatever the reasons for failure to send the records, that Mr. McWilliams is being punished instead of the people who have not provided the material. We simply do not have anything to present at this time.

THE COURT: Any response, Mr. Freeman?

MR. FREEMAN: If The Court please, in hearing Mr. Sogol tell about the records, and so forth, as I recall, I don't recall hearing anything that would indicate any evidence of psychosis of this man today, in any records. Now, I don't know how long this checking test scores, and so forth, how far that can go. I certainly as the District Attorney, do not want anything to happen concerning this case which might cause a reversal on appeal, and certainly that is something that I as District Attorney, must always try to guard against. But I am not following the argument of the Defense as to anything in these records: in other

words, Doctor Goff has checked the man out, he has given him an examination, and he has reached his conclusions. This was at the request of the Defense originally, as I re-[1410]call.

MR. SOGOL: Not that it be done at Taylor Hardin.

MR. FREEMAN: No, sir. I wasn't done at Taylor Hardin, as I recall. He was housed at Taylor Hardin.

MR. SOGOL: I was done at Taylor Hardin.

MR. FREEMAN: And Doctor Goff is not associated with Taylor Hardin, as far as I know.

MR. SOGOL: Judge, my point to you is: he was brought up here taking psychotropic medication; when I was advised of that, I sent subpoenas to the people who had dispensed the medication to him, for the reasons--there are at least 2 provisions under State Law that deal with mitigating circumstances, that deal with mental or emotional condition--that if the man has been found to have psychotic tendencies or to need antipsychotic medication, that that may in fact be mitigation or weigh as a mitigating circumstance. At the time I found out about it until today, I have done everything in my power, and I think Charlie has done everything in his power to get that material here for evaluation. And it arrived this morning, and it is not enough time [1411]for me to determine whether or not I need to have the doctor from Holman come up here and testify that he tested this man and he was found to be psychotic or not. All I have is the medication that he

is taking, and I think that it is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered. I mean, it seems to me that Mr. McWilliams twice prior to my intervention with the requested examination, had already been examined at length on 2 occasions, by the people at Taylor Hardin; he had been examined by the people in the correctional facilities, and no one in any of those places has determined that there might be any organic problem; that people who were volunteering their services to me were reviewing the Bryce records, the Taylor Hardin records, the social history of Mr. McWilliams. And they determined that there might be a problem, based on the symptomatology in the records and the social history. It seems to me that if we are going to put our faith in Taylor Hardin and people out there, that they ought to be as trained individuals and supposed experts in their areas, able to find things like that without having to be told that they exist. And I have very little confidence in their findings.

Mr. FREEMAN: An additional comment, if The Court please: Mr. Bivens that Mr. Sogol was referring to is, of course, not the attorney at the counsel table, but rather [1412]a Psychologist II, which is a level of psychologists with the prison system--I believe it is the Department of Corrections, and it is a matter of record in the Court File. As I understand it, that is far from the highest level of expertise in psychology--that he merely suggested that these tests perhaps should be conducted. And that following that, these tests were conducted, as I understand it, and the conclusions have been reached and given to The Court in the form of the letter to Doctor--I

am not sure how than name is pronounced--Goff or Jeff, or whatever it is.

THE COURT: All right. Well, let's proceed.

MR. FREEMAN: If I can, I will agree, if The Court please, that the matters that Mr. Sogol has stated about the problems that we have had with the Department of Corrections, that is certainly true, as Your Honor is probably well aware, also. We have had considerable difficulty in getting these records from them, and also, I believe, the Department of Mental Health, at this point.

MR. SOGOL: Yes, sir.

THE COURT: Anything else, Mr. Sogol?

MR. SOGOL: No, sir, other than offering from the [1413]PDR, showing the 3 drugs that Mr. McWilliams has had prescribed by The Department, showing that they are for antipsychotic indications. One of them, at least, is specifically for antipsychotic treatment. And the other 2 are collateral to the Mellaril, and used in addition to it. We have not got the ability to present anything else at this time.

THE COURT: All right. Let's proceed, Mr. Freeman.

EVIDENCE FOR THE STATE OF ALABAMA

MR. STEVERSON: We call as our first witness, Your Honor, Belinda Medders.

Appendix G

BELINDA MEDDERS,

was sworn, examined, and testified as follows:

DIRECT EXAMINATION

BY MR. STEVERSON:

Q State your name for the record, please.

A Belinda Medders.

Q And what is your occupation?

[1414]A State Probation and Parole Officer.

Q And how long have you been involved in that kind of work?

A Slightly less than 5 years.

Q And are you employed here in Tuscaloosa County with the Probation Office?

A Yes, I am.

Q Now, Ms. Medders, you have been assigned the case of James Edmond McWilliams, Jr. Is that correct?

A That's correct.

Q And what did you receive this assignment?

A Subsequent to his--The request for the pre-sentence was subsequent to his conviction, in August: late August.

Q And have you had the opportunity and the time necessary to do a report?

A Yes, I have.

Q And have you completed that report?

A Yes, I have.

Q And has that report been made a part of the court record?

A Yes, it has.

Q Now, Ms. Medders, I want to ask you what all did you do in your investigation of this case, and into the background of Mr. McWilliams.

A Okay. As a routine course in our office, we have a format to follow in doing any pre-sentence or probation investigation. Within that report we detail the offense: that is, give information about the circumstances of the crime. We [1415]also go into making available space for the subject's statement as to his involvement or lack of involvement in the offense; we detail the case status of co-defendants, and we also include victim information--information that is of the victim's names, and the impact that the offense has had on the survivors in the family. Also in that report we detail the legal history of

the Defendant, which is to include prior arrests, which would include juvenile and adult offenses. Then there is a personal social history segment of the investigation, where we detail information about the Defendant: that is, information as to where he has lived, where he has gone to school, spouse's names, children's names, parents' names, sibling's names, educational history, information about their health, information about prior employment, and military information. Attached to that report are also other reports of interest such as psychological reports, and we do a reputation and community activities segment, which, in that segment, we contact references, people who know the Defendant and who are willing to make statements as to what they know of the person's attitude or reputation.

Q Anything else?

A I don't know whether I mentioned it, but we do also attach to the report letters that we have received from the victim's family. We are required by State Law to notify each surviving member of the victim's family by certified mail. [1416]And they are able to put some input into our report in that they respond back to us with information regarding financial loss, psychological injury, their recommendation as to punishment in the case, and just anything that they want to say about how the crime has affected them and their lives.

Q Now, Ms. Medders, those things that you have detailed there, you have done each and every one of those things in this case; is that correct?

A Yes, I have.

Q And based upon the information that you have been able to receive through your investigation, have you been able to form an opinion as to what is the proper punishment for this Defendant in this case?

A Yes, I have.

Q And what is that opinion?

MR. SOGOL: I object to this witness answering this question. It is beyond the scope of her employment. The ultimate question is to be decided by The Court, Your Honor.

MR. STEVERSON: Your Honor, I think that that is just a part of the factors to be considered by Your Honor in determining whether or not the proper sentence- - What is the proper sentence in this particular case. I [1417]think that is also a part of the record, and that she has also made that recommendation within the record, Your Honor, that she has submitted before The Court.

MR. SOGOL: Your Honor, there is no requirement, as I understand it, that the Probation Office make a recommendation as to sentencing. There is a Remarks area, which Ms. Medders used.

THE COURT: I have Ms. Medders' written report which I have read. It is thorough. I will sustain the objection as to her ultimate opinion.

MR. STEVERSON: All right. No further questions from this witness, then, Your Honor. One moment, please, Your Honor.

BRIEF PAUSE

MR. STEVERSON: Your Honor, I think Ms. Medders' report is already in the Court File, but we would just like to make a formal offer--offer her report as evidence in the case, as mandated by the Code of Alabama.

THE COURT: All right. It will be admitted.

[1418]STATE'S EXHIBIT 1 TO THIS HEARING MARKED AND ADMITTED INTO EVIDENCE HERE

MR. SOGOL: We would object to it, Your Honor, as it exists now. I think the attachment of the family recommendations is beyond the scope of what this report is supposed to be. It is supposed to be a report from the Probation Office, and not a compilation of letters and recommendations from the family. I think that that goes beyond what the report is supposed to be.

MR. FREEMAN: If The Court please, we would submit that this is a hearing which is not a jury hearing but rather a hearing before The Court. The Court determines.

THE COURT: I will be admitted, Mr. Freeman.

Appendix G

CROSS EXAMINATION

BY MR. SOGOL:

Q Ms. Medders, did you at any time talk with Mr. McWilliams about this case?

A No, sir, I never talked personally with Mr. McWilliams, as is noted in the report on page 7.

[1419]Q He was already gone from the Tuscaloosa County Jail by the time you were assigned the case, was he not?

A That's correct.

Q Did you make any effort to go down to Holman to talk to him?

A No, I did not.

Q The information about Mr. McWilliams comes from another source. Is that correct?

A Several sources.

Q I have no further questions of this witness.

MR. STEVERSON: Nothing further, Your Honor.

THE COURT: You may step down.

MR. FREEMAN: If The Court please, we would now at this time offer to resubmit all of the evidence that has been presented to The Court and received into evidence by The Court and all of the previous trial in this case, and all previous hearings.

THE COURT: Okay.

MR. FREEMAN: And with that, then, The State would have nothing further at this time.

[1420]THE COURT: All right. Does the Defense have anything, Mr. Sogol?

MR. SOGOL: Your Honor, we would request a continuance to allow us to go through the material that has been provided to us in the last 2 days, and to allow us to evaluate and assess whether there might be anything in that material which would lead to mitigating circumstance being established for The Court.

THE COURT: The material submitted by Taylor Hardin is, other than your copy, is in the Clerk's office, is it, Mr. Freeman?

MR. SOGOL: No, sir. That is the Clerk's. There is only one copy provided, Judge.

THE COURT: Well, I want that submitted to me, then, Mr. Sogol, and I am going to look over it.

MR. SOGOL: Would Your Honor want to make this a part of the record?

THE COURT: That will be fine.

MR. SOGOL: I point out to Your Honor, there are [1421]no test results in here; there are no test formats. Do you want to mark that Defense Exhibit 4, to this hearing, please, Paul?

DEFENSE EXHIBIT 4 MARKED FOR IDENTIFICATION

THE COURT: It will be admitted.

DEFENSE EXHIBIT 4 ADMITTED INTO EVIDENCE

MR. SOGOL: I point out to Your Honor- I have only skimmed through that portion of the material which is marked "3d Admission," but I have not had an opportunity to actually sit down and read it since it did not come to The Court until yesterday, in and of itself.

THE COURT: Well, I will give you an opportunity to read it, Mr. Sogol, together with The Court. Also, the material here that is given to The Court by Holman Prison that come in this morning, which I am also review. At that time, The Court will entertain any motion that you may have with some other person to review it. Otherwise, The Court will pronounce sentence at 2 o'clock.

MR. SOGOL: Today, Your Honor?

THE COURT: Today, yes.

[1422]MR. SOGOL: May I point out, Your Honor, it is 20 minutes to eleven, and that there is no way that I can go through this material - -

THE COURT: Well, I will give you the opportunity. Mr. Sogol. If you do not want to try, then you may not. Anything else?

MR. FREEMAN: Would we be able to make argument at 2 o'clock?

THE COURT: Yes, sir.

MR. FREEMAN: All right, sir.

THE COURT: We stand adjourned, then, until 2 o'clock this afternoon.

COURT IN RECESS UNTIL TIME STATED ABOVE

[1423]2:15 p.m., October 9, 1986

THE COURT: Let the record show, Mr. Smith, that since our recess, The Court has reviewed those records from Taylor Hardin that are pertinent here. That is Defense Exhibit 4, I believe, isn't it?

THE REPORTER: Yes, it is

THE COURT: The Court has also reviewed all the records from Holman which are in response to a subpoena and order of the Court, which The Court considers to a part of the record. Are you gentleman ready?

MR. FREEMAN: Yes, sir.

MR. BIVENS: Judge, If I could renew our motion for a continuance at this time, and try to clarify something for The Court, in renewing the Motion for a Continuance.

It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that [1424]the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

THE COURT: Your motion is denied.

MR. BIVENS: All right. We do except.

MR. FREEMAN: Is Your Honor ready to proceed?

THE COURT: Yes.

CLOSING ARGUMENT

BY MR. FREEMAN:

[1425]First of all, I would like to express my apology to The Court for holding up this Court for a few minutes. I had another matter that was to me very important. And I apologize for the delay. If The Court please, of course, what we are looking at here has to do with mitigating or aggravating circumstances, as the jury did.

And we feel that we proved at least two: we proved murder robbery and murder during rape, and we feel that the evidence overcame the burden of proving mitigating circumstances by a preponderance of the evidence. We showed that the Defendant has prior convictions of robbery in the 1st degree, and rape in the 1st degree: felonies involving, in the words of the statute, the use or threat of violence to the person. This was a particularly heinous, atrocious, and cruel crime compared to others. He shot this victim so needlessly in order, I submit, to eliminate her as a witness because this crime was almost exactly as the other crime he had committed: It was a robbery and a rape, only this time he eliminated the witness.

Appendix G

He shot her as she was either falling down or had already fallen to the floor, evidencing particularly cruelty and a sadistic mental attitude; he raped and apparently immediately shot the victim in this case because of the manner, if Your Honor recalls, of the way she was dressed, the manner of her clothing; the facts and circum-[1426] stances in that bathroom where she was murdered; essentially no mitigating circumstances, we would submit, a total lack in this case on behalf of the Defendant; no evidence of any mitigating circumstances, in the words of the statute. I have looked at each and every one of them, I can't see where any of them apply. And in the weighing process, as a proper conclusion we submit there is only one conclusion in this case, and that is death as the jury recommended. And we recommend the death penalty in this case for this Defendant. We feel that if the death penalty was ever designed for any Defendant, it was designed for this Defendant, arising out of the facts and circumstances of this case.

Unfortunately it seems to be too easy for this Defendant. But of course, that is what the law provides. And when, if Your Honor sees fit to pronounce that sentence upon this Defendant, when the only thing the public can do to protect itself against men such as this killer has been done, when this man is dead, I hope that God will do whatever is appropriate in His eyes for this Defendant. Thank you very much.

THE COURT: Anything for the Defense?

Appendix G

MR. SOGOL: Your Honor, I would be pleased to respond to Mr. Freeman's remarks that there are no mitigating [1427]circumstances in this case if I were able to have time to produce have time to produce any mitigating circumstances.

I would simply point out to Your Honor something that you told me this morning: Neither one of us are doctors. Neither one of us are really capable of going through those records on our own and determining what was done or what Mr. McWilliams has or does not have, in the way of a mental disease or disorder; that both of those conditions are recognized as mitigating circumstances by the statute. I point out to Your Honor that there is an actual distortion between what some of the doctors have said at Taylor Hardin and what is reported in the Lunacy Commission report, with specific reference to Dr. Nagi's report. The Lunacy Commission Report says that they found that there was malingering. The Doctor's report specifically rules out malingering. It finds other things in the summary, from the Lunacy Commission alleging well-planned crime, and using words like that that are nowhere in the Doctor's report. And for whatever reason, it has been our contention and continues to be our contention that the simple use of the records from Taylor Hardin is insufficient to determine what happens out there, and what is going on, and what Mr. McWilliams' problems, if any, are. That is why we had continually asked for the specific tests themselves or the tests so that we can have people, our own people, evaluate them.

[1428]It just seems to me that there is nothing else that we can offer to The Court. In my opinion, The Court has foreclosed by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms. And at that point, I have nothing else to say.

THE COURT: Anything else from you?

MR. FREEMAN: No, sir, nothing else.

THE COURT: Well, this Court has reviewed the records, and this Court finds apparent throughout all the records, the following quotes: "No evidence of psychosis; no psychosis; not psychotic; faking; feigning; seen as manipulative; et cetera."

MR. SOGOL: May I ask Your Honor a question?

THE COURT: I gave you, Mr. Sogol, the opportunity to examine them also, and you declined.

MR. SOGOL: No, sir. I would like an opportunity to reply to that, Your Honor.

THE COURT: All right.

[1429]MR. SOGOL: I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?

THE COURT: As I said, on the record earlier, Mr. Sogol, and I don't want to argue or belabor this, but I would have given you the opportunity to make a motion to present someone to evaluate that.

MR. SOGOL: Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?

THE COURT: I want you to approach with your client, please.

THE DEFENDANT, JAMES EDMOND MCWILLIAMS, JR., AND HIS CO-COUNSEL, JOEL SOGOL, ESQUIRE, AND JOHN BIVENS, ESQUIRE, STOOD BEFORE THE BENCH HERE

THE COURT: Mr. McWilliams, on the 27th of August, 1986, you were found guilty of capital murder in this case. On the 28th day of August, 1986, the jury recom-[1430] mended that you be punished by death. Do you have anything to say why sentence should not be pronounced?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Go ahead.

THE DEFENDANT: Your Honor, I am sure, as you know, I filed a lawsuit against Taylor Hardin Facilities earlier in 1985. And as a part of that lawsuit, I filed a Motion to Produce, and in that Motion to Produce there were documents that the Federal Judge ordered Taylor Hardin to produce for me. In those documents, Your

Honor, I found discrepancies in the Lunacy Commission Report that was sent to This Court. I have just then been sent, since then, back to Taylor Hardin where I had opportunity to talk to Dr. Nagi. I confronted Dr. Nagi with these reports, and asked him specifically concerning the malingering, particularly concerning the mimicking, psychological disorder; I asked him about the overly dramatic acting, and other notations that were made in this 4-page report. Dr. Nagi said this was inconsistent with what he would testify to in this Court today. I told my attorneys about this. Mr. Sogol and Mr. Bivens have chosen not to call Dr. Nagi. I asked them to call Dr. Nagi so he could testify that that there were not his statements, but his name was being used to validate the [1431]statements, and the Dr. Poythress had misinterpreted what he meant. But Mr. Bivens and Mr. Sogol chose not to call him.

At this time, Your Honor, I can show you--I cannot speak for Dr. Nagi, but I can show you exactly in these 2 reports here where they are different, they are totally different. I can show Your Honor where Dr. Poythress has purposely misled This Court and being the Forensic Examiner Director, he purposely maliciously misled this Court into believing that there was nothing wrong with me.

In my lawsuit it alleges other things that he has said concerning these people. He knows the victim's family, and he purposely did this. And I can show this to This Court today, if Dr. Nagi were here, and he would testify to. I asked my attorneys to bring him; I cannot do any more than that. I can't make anyone to do anything. I am in jail. I have no telephone or nothing. So I have no other means. So, Your Honor, I just wanted to bring up that point and let

you know that at Taylor Hardin I do not receive an equal or let me think of another word to use- - I do not receive a just evaluation at Taylor Hardin, or from anyone that is employed there. That's all I have.

THE COURT: As punishment for this crime, Mr. [1432]McWilliams, This Court sentences you to death by electrocution in the manner and form provided by law.

This Court will draft a written order of findings as required by law.

THE DEFENDANT: Yes, sir.

THE COURT: Anything further?

NO FURTHER RESPONSE

MR. BIVENS: Your Honor, before we adjourn, we do want to give official notice of appeal.

THE COURT: That is automatic anyway, I'm sorry.

MR. BIVENS: And that would be in forma pauperis.

THE COURT: This Court stands adjourned.

COURT ADJOURNED

COMPLETION OF REPORTER'S
TRANSCRIPT ON APPEAL

ECORD
AND
RIEF

No. 16-5294

FILED
FEB 27 2017

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

JOSHUA S. MELTZER
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

STEPHEN B. BRIGHT
Counsel of Record
MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

270814

COUNSEL PRESS

CAPITAL CASE
QUESTION PRESENTED

When this Court held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," did it clearly establish that the expert should be independent of the prosecution?

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ORDERS AND OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc is unreported and appears in the Joint Appendix (J.A.) at J.A. 17a. The unpublished per curiam decision of the Eleventh Circuit affirming the district court's denial of McWilliams's petition for a writ of habeas corpus, *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015), along with the concurring and dissenting opinions, appears at J.A. 19a. The relevant excerpts from the federal magistrate judge's report and recommendation denying McWilliams's habeas petition, which was accepted by the District Court for the Northern District of Alabama without further comment on the *Ake* claim, appears at J.A. 64a. The opinion of the Alabama Court of Criminal Appeals affirming McWilliams's conviction, along with the dissenting opinion, is published at *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), and appears at J.A. 92a. The opinion of the Alabama Supreme Court affirming McWilliams's conviction without addressing the *Ake* claim is published at *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of McWilliams's petition for a writ of habeas corpus in an opinion dated December 16, 2015, J.A. 19a-63a, and subsequently denied McWilliams's petition for rehearing en banc in an order dated February 16, 2016, J.A. 17a-18a. McWilliams's petition for a writ of certiorari was filed in this Court on July 15, 2016, and granted on January 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The Alabama judge who sentenced James McWilliams to death did not find a single mitigating circumstance to weigh against three aggravating circumstances. However, two days before sentencing, the parties and the court received a neuropsychologist's assessment reporting that McWilliams had "organic brain dysfunction." T. 1634.[1] The assessment found that McWilliams had "genuine neuropsychological problems" and an "obvious neuropsychological deficit," which included "cortical dysfunction attributable to right cerebral hemisphere dysfunction" indicative of a "right hemisphere lesion." T. 1634-36.

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1. "T." refers to the certified trial record, which can be found in Volumes 1-10 of the state court record as filed in the district court. *See* D. Ct. Doc. 12 (Dec. 17, 2004) (Resp't's Habeas Corpus Checklist). "P.C.R." refers to the clerk's record from the state post-conviction proceedings; "P.C.T." refers to the certified court reporter's transcript from the state post-conviction hearing. The clerk's record and court reporter's transcript from the state post-conviction proceedings can be found in Volumes 16-38 of the state court record as filed in the district court. *See* Doc. 12. The remaining volumes of the state court record contain appellate briefing and opinions.

The day before the judicial sentencing hearing, all parties received McWilliams's updated records from the state mental hospital. The following morning, just prior to the hearing, all parties received records from the state prison where McWilliams was being held, which showed that he was being treated with psychotropic medication. Defense counsel had subpoenaed the prison records approximately two months earlier, but did not receive them until moments before the hearing. Defense counsel repeatedly sought a continuance in order to consult with an independent defense expert about the neuropsychological assessment and the records so as to understand and interpret them and then to fashion a mitigation case based on the evidence of McWilliams's mental disorders and impairments. Consultation with an expert also would have provided defense counsel with an opportunity to rebut the testimony of the State's experts from a previous sentencing hearing before a jury that McWilliams had no real mental impairment and that he had malingered on his psychological tests. The judge denied the motions and sentenced McWilliams to death. In imposing that sentence, the judge concluded that McWilliams had faked the answers on his psychological tests and on that basis found no mitigating circumstances.

McWilliams argued on appeal that he was denied his right to independent expert assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Affirming the death sentence, the Alabama Court of Criminal Appeals held that *Ake* did not entitle McWilliams to anything more than the views of the psychologist who reported simultaneously to the prosecution, the defense, and the judge. J.A. 106a.

A. Trial and Sentencing Before the Jury

McWilliams was charged with the rape and murder of Patricia Reynolds, which occurred during the robbery of a convenience store in Tuscaloosa, Alabama, on December 30, 1984. T. 1646-47. The trial court found him indigent and appointed counsel to represent him. T. 1440-41. Prior to trial, the defense filed a "Petition for Inquisition Upon Alleged Insane Prisoner," T. 1526, and, in response, the court ordered that McWilliams be sent to the Taylor Hardin Secure Medical Facility, a state hospital, for examination. A "Lunacy Commission" was convened to conduct the evaluation and found that McWilliams was competent to stand trial, that he was sane at the time of the crime, and that there "seem[ed] to be no mitigating circumstances involved" in the case. T. 1544-47.

McWilliams was convicted of capital murder on August 26, 1986. T. 1292. The sentencing hearing before the jury began the following day, and testimony lasted less than three hours. T. 1294-95, 1370. The prosecution reintroduced its evidence from the guilt phase, T. 1297, and also called a police officer to testify that McWilliams had a prior conviction, T. 1299-1303.

The defense called McWilliams and his mother. Both testified about head injuries McWilliams suffered as a child and the headaches, doctor visits, and medications that followed. T. 1303-18, 1320-35. McWilliams also testified that he had been seen by several psychiatrists and psychologists both before his arrest and after it while in state custody. T. 1321-27. He then read from the report of a psychologist who had evaluated him prior to his arrest; the report stated that he had a "blatantly

psychotic thought disorder," T. 1330, and needed inpatient treatment, T. 1331-32. When the prosecutor questioned McWilliams about the neurological effects of his head injuries, McWilliams replied, "I am not a psychiatrist." T. 1328. The prosecutor also pressed McWilliams's mother:

> Q: You are not saying James is crazy, are you?
>
> A: I am no expert: I don't know whether my son is crazy or not. All I know, that my son do need help.
>
> * * *
>
> A: I said that I believe my son needs help, professional help: the help that I cannot give him.

T. 1317-18. Defense counsel had subpoenaed McWilliams's mental health records from Holman Prison on August 13, to be delivered by August 25, T. 1618, but the prison did not produce them, so the defense presented no additional evidence, T. 1319.

In rebuttal, the State presented the testimony of a psychiatrist and a psychologist from the state mental hospital. T. 1336-1369. The psychiatrist, Dr. Kamal Nagi, who was a member of the Lunacy Commission, testified that he found no evidence of psychosis. T. 1340. In support of that finding, he said that two Minnesota Multiphasic Personality Inventory assessments ("MMPIs") were performed on McWilliams. T. 1353. He then backtracked, saying that a second test was recommended, but he was not sure if it was given. T. 1353-55. He ultimately stated

that only one MMPI was done, but not by him, and he volunteered that "the results were faked bad." T. 1354. He also testified that observation and interviewing are "more important than psychological testing," T. 1355, yet he was unaware of McWilliams's history of head trauma, T. 1351-52.

Dr. Norman Poythress, a psychologist who signed the final report issued by the Lunacy Commission, testified that the MMPI administered to McWilliams by a graduate student at the state hospital was "clinically invalid" because the test's "validity scales" indicated that McWilliams had not been candid in his responses. T. 1361-64. Dr. Poythress testified that a second test was not given. T. 1365.

Ten jurors voted for a death sentence—the minimum required for a death recommendation under Alabama law. *See* Ala. Code § 13A-5-46(f) (1981). The other two jurors voted for a sentence of life in prison without parole. T. 1400. A judicial sentencing hearing was scheduled for October 9, 1986.

B. Judicial Sentencing Hearing

Prior to the judicial sentencing hearing, which is required by Alabama law,[2] defense counsel filed a motion for neuropsychological testing of McWilliams, T. 1615, as well as a motion to require the Department of Corrections

2. Because the jury's recommendation was not binding on the judge, the court was required to hold a separate judicial sentencing proceeding and impose sentence. Ala. Code §§ 13A-5-45 to -47 (1981).

to show cause as to why it should not be held in contempt for failing to produce McWilliams's mental health records, which had been subpoenaed in August but still had not been produced, T. 1618. The court granted both motions, T. 1612-13, but McWilliams's counsel did not receive the results of the neuropsychological testing until October 7, 1986—just two days before the judicial sentencing hearing—and did not receive the prison records until the morning of the sentencing. T. 1631-32; J.A. 191a-193a.

On the afternoon of October 7, an assessment prepared by Dr. John Goff, who, like Dr. Nagi and Dr. Poythress, worked for the state's Department of Mental Health, was distributed to the court and the prosecution as well as the defense. T. 1631. According to the report, Dr. Goff found that McWilliams had "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634. More specifically, McWilliams suffered from "cortical dysfunction attributable to right cerebral hemisphere dysfunction," which manifested in "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636. These deficits were "suggestive of a right hemisphere lesion," T. 1635, and were "compatible with the injuries [McWilliams] says he sustained as a child," T. 1635. Accordingly, Dr. Goff concluded that McWilliams had "genuine neuropsychological problems" and an "obvious neuropsychological deficit." T. 1635.

Counsel also did not receive McWilliams's updated records from the state mental hospital until the day before sentencing, and they did not receive the Holman Prison records until they arrived to court on the morning of the sentencing hearing. J.A. 191a-193a. The prison records indicated that McWilliams was "on an assortment

of drugs that were prescribed for him by the prison authorities," J.A. 190a, including Desyrel, Librium, and the antipsychotic Mellaril. J.A. 190a-191a.

When the sentencing hearing began, McWilliams's counsel informed the judge that due to the late arrival of the report and records, he needed time to "have someone else review these findings." J.A. 193a. He stated, "[I]t is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered," J.A. 196a, that is, an opinion other than the one produced by the neutral expert Dr. Goff. In support of his request, counsel explained that he could not understand and meaningfully present the information he had just received, as Dr. Goff's neuropsychological testing was sophisticated[3] and the records were lengthy and technical.[4] J.A. 190a-196a.

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3. Dr. Goff reported that he relied upon the Halstead-Reitan Neuropsychological Test Battery, which consisted of seven tests, as well as the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the Halstead-Wepman Aphasia Screening Test, the Trail-Making Test, and the Wechsler Memory Scale (WMS). T. 1633. Dr. Goff also had another MMPI administered, T. 1633, but he found that "[p]ersonality assessment via the MMPI was not possible." T. 1635. He indicated that the MMPI results were invalid due to either a "cry-for-help" response set or a "fake-bad." T. 1635.

4. The receipt accompanying the delivery of the records from the state hospital to the court clerk on October 8, 1986, indicates that the records spanned 1233 pages. P.C.R. 2983. Some of those were likely duplicates of records previously disclosed, but any records pertaining to Dr. Goff's evaluation of McWilliams—which spanned at least 88 pages, P.C.R. 2897-2984—would have been new to counsel. In addition, counsel also received the Holman Prison records on the morning of sentencing. Defense counsel made clear that the two sets of documents were too voluminous to review that morning. *See* J.A. 206a ("there is no way that I can go through this material").

In response, the judge stated, "All right. Well, let's proceed." J.A. 197a. The prosecution presented the testimony of the probation officer who prepared a presentence investigation report and introduced the report into evidence. J.A. 198a-203a. The judge made the records from the state hospital, the prison records, and Dr. Goff's report part of the record even though Dr. Goff did not testify and no one explained his assessment or the records. J.A. 205a, 207a.[5] The judge recessed at approximately 10:40 a.m., indicating that defense counsel could review the records before pronouncement of sentence at 2:00 p.m. J.A. 205a-206a. In response, counsel reiterated that there was "no way" he could go through all the material in that amount of time. J.A. 206a.

During the recess, counsel filed a motion to withdraw, arguing that "the abritrary [sic] position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." T. 1644. The motion was denied. T. 1644.

When court resumed, defense counsel stated:

> [W]e cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition

5. Although they were admitted and made part of the record, neither the Holman Prison records nor the majority of the records from the state hospital—except for the 88 pages pertaining to Dr. Goff's assessment—are included in the state court record that was filed in the district court and is now part of the record before this Court. *See* P.C.R. 1938.

> exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

J.A. 207a. The motion was denied. J.A. 207a.

The prosecutor then gave his closing argument, stating that there were "no mitigating circumstances" to weigh against the aggravating circumstances. J.A. 209a. Defense counsel followed, beginning, "I would be pleased to respond to Mr. Freeman's remarks that there are no mitigating circumstances in this case if I were able to have time to produce any mitigating circumstances." J.A. 210a. Moments later, defense counsel concluded, "The Court has foreclosed[,] by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms." J.A. 211a.

The trial judge stated that he had reviewed the mental health records during the break and found passages indicating that McWilliams was faking and manipulative and that there was no evidence of psychosis. J.A. 211a. Defense counsel reiterated, "I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?" J.A. 211a. When the judge replied that he would have given the defense

"the opportunity to make a motion," J.A. 212a, counsel responded, "Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?" J.A. 212a. The trial judge responded, "I want you to approach with your client, please." J.A. 212a. He then sentenced McWilliams to death. J.A. 214a.

In a written sentencing order, the judge found three aggravating circumstances[6] and no mitigating circumstances because "the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative." J.A. 188a. With regard to the records from the state hospital and prison—which were unexplained by an expert or anyone else, but indicated that McWilliams was being administered antipsychotic medication—the judge stated that McWilliams "was not and is not psychotic." J.A. 188a.

C. State Appellate and Post-Conviction Proceedings

On appeal, McWilliams argued to the Alabama Court of Criminal Appeals that he was denied his due process right to meaningful expert assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Appellant's Br. at 47-52 (Vol. 11, Tab #R-33). In his brief, McWilliams stated:

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6. The trial court found that McWilliams was previously convicted of another felony offense involving violence to a person, that the murder was committed during the commission of a rape and robbery, and that the offense was especially heinous, atrocious, or cruel compared to other capital cases. J.A. 182a-184a.

> Defense counsel received Dr. Goff's written report less than two days before the sentencing hearing. He did not understand it, but he sensed that it was sufficiently favorable to merit further investigation. Counsel advised the Court that he lacked the expertise to interpret the highly technical report. He explained that Dr. Goff's findings appeared to conflict with the findings of the Taylor Hardin experts. Counsel literally begged the Court for an opportunity to consult with an expert who could explain the report to him. The Court refused to allow this.

Appellant's Br. at 48-49. McWilliams added that the accuracy of the sentencing proceeding would have been "'dramatically enhanced' if counsel had the assistance of an expert to help him 'translate a medical diagnosis into language' that the court would have understood." Appellant's Br. at 49 (quoting *Ake*, 470 U.S. at 80, 83). The Court of Criminal Appeals affirmed, holding that *Ake* is satisfied "when the State provides the [defendant] with a competent psychiatrist." J.A. 106a.

McWilliams sought certiorari review in the Alabama Supreme Court, arguing that *Ake* "prohibits granting neuropsychological testing but denying an expert to assist the defense with understanding and presenting the test results." Pet'r's Br. at 37 (Vol. 13, Tab #R-38). The Alabama Supreme Court affirmed without addressing the *Ake* issue. *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

McWilliams filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal

Procedure, raising a number of issues. Among the witnesses who testified at a hearing on the petition was Dr. George Woods, a psychiatrist, who explained that one possibility for high scores on certain MMPI scales is, in fact, "that a person is just so pathologically disturbed that their testing brings that out, and so you see a number of elevations, you see a number of areas, where they are pathologically disturbed." P.C.T. 941. An elevated scale can also reflect that a person has exaggerated certain responses but is still mentally ill. P.C.T. 940-42. The Alabama courts denied post-conviction relief. P.C.R. 1775-1828.[7]

D. Federal Habeas Proceedings

McWilliams then sought relief in the federal courts pursuant to 28 U.S.C. § 2254. In the United States District Court for the Northern District of Alabama, he argued that he was denied his Fourteenth Amendment right to due process of law because he did not receive the assistance of an independent expert required by *Ake*. D. Ct. Doc. 1 at 96-99 (Oct. 6, 2004). The magistrate judge, in his report and recommendation that was later accepted by the district court, ruled that the appointment of Dr. Goff satisfied *Ake* and, as such, the decision of the Alabama Court of Criminal Appeals was not an unreasonable application of "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). J.A. 90a.

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7. The denial of the post-conviction petition was affirmed on appeal, and the Alabama Supreme Court denied certiorari. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

The Court of Appeals for the Eleventh Circuit affirmed in a per curiam decision with one judge concurring and one judge dissenting. J.A. 19a-63a. The court found that McWilliams had received the constitutionally required expert assistance by being provided Dr. Goff's report two days before the judicial sentencing hearing. J.A. 33a-36a. The court also suggested that defense counsel could have contacted Dr. Goff, even though he was also available to the prosecution, and called him as a witness, even without understanding his assessment. J.A. 35a. It stated:

> Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

J.A. 35a. The court held that the denial of an expert was not contrary to or an unreasonable application of "clearly established Federal law" because although some circuits "have held that the state must provide a non-neutral mental health expert to satisfy *Ake*," in other jurisdictions, "a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*." J.A. 34a.

Judge Wilson dissented, finding that "the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect." J.A. 63a. He explained:

> Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process.

J.A. 58a-59a. In response to the suggestion that defense counsel could have consulted with Dr. Goff, Judge Wilson observed that Dr. Goff could not possibly provide the kind of expert assistance contemplated by *Ake* because he was free to "cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a.[8]

This Court granted certiorari to address the question of whether *Ake* clearly established that an indigent defendant who makes a threshold showing that mental health issues will be a significant factor at trial has a right to a mental health expert who is independent of the prosecution.[9]

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8. McWilliams presented his *Ake* claim again in a request for rehearing. That request was denied on February 16, 2016. J.A. 17a-18a.

9. There is no question that McWilliams's mental health was a "significant factor" in the case. *See Ake*, 470 U.S. at 83. Nearly all of

SUMMARY OF THE ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that an indigent defendant with mental health issues significant to his case is entitled to an expert to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. That assistance includes gathering information for the defense, helping the defense assess the viability of potential defenses, aiding the defense in preparing the cross-examination of the prosecution's mental health experts, and translating medical concepts into language understandable to lay people. *Id.* at 80-82. This Court recognized that such assistance is essential to providing the defendant "a fair opportunity to present his defense," *id.* at 76, and to ensuring that facts are resolved based on the views and expertise of "psychiatrists for each party," which is consistent with the adversary system, *id.* at 81. Thus, *Ake* clearly established the right to an independent expert to assist the defense. The ruling of the Alabama Court of Criminal Appeals that *Ake* was satisfied by the appointment of a neutral expert who reported to the prosecution, the defense, and the judge, *see* J.A. 106a, is contrary to and an unreasonable application of *Ake*.

First, the role of the expert guaranteed by *Ake* demonstrates that the expert provided to the defense

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the penalty phase evidence focused on it, T. 1299-1369, and both the majority and the dissent below recognized its central role, *see* J.A. 22a (per curiam) ("McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case . . . ."); J.A. 53a n.1 (Wilson, J., dissenting) ("McWilliams's mental health was a significant factor in his sentencing proceedings . . . . There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing.").

must be independent of the prosecution. The state trial court in *Ake* had denied the defendant's request for expert assistance, finding that the evaluations of "neutral" experts who reported to the court, the prosecution, and the defense were sufficient. *Ake*, 470 U.S. at 73, 84-85. This Court reversed, holding that due process requires an expert to assist the defense. *Id.* at 83-87. The specific types of assistance described by the Court, including consultation and trial preparation, cannot be achieved absent independence from the prosecution. As Judge Wilson recognized in his dissent below, it would be untenable for an expert to help the defense prepare for cross-examination of the prosecution's experts, "only to cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a. Similarly, a defense attorney could not consult with an expert about potential defenses if the expert was free to share the content of the consultation with opposing counsel. Nor could the expert assist the defense in preparing for cross-examination if the expert was going to testify for the prosecution.

Second, then-Justice Rehnquist's dissent in *Ake* confirms that *Ake* clearly established the right to an independent expert to assist the defense. Justice Rehnquist dissented to express his disagreement with the Court's holding that due process requires an expert to assist in "*evaluation, preparation, and presentation of the defense.*" *Id.* at 92 (Rehnquist, J., dissenting) (emphasis in original).

Third, this Court reiterated in subsequent decisions that *Ake* requires an independent expert. It remanded a Virginia case the year *Ake* was decided and later

explained that it did so because under *Ake*, "due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995). It also emphasized in *Ford v. Wainwright*, 477 U.S. 399 (1986), that under *Ake*, "the factfinder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party.'" *Ford*, 477 U.S. at 414 (plurality opinion) (quoting *Ake*, 470 U.S. at 81).

Fourth, when *Ake* was decided, federal courts already provided for the assistance of experts "necessary for an adequate defense" under the Criminal Justice Act. This Court referred to the Criminal Justice Act in *Ake* and then adopted language similar to it. This is significant because numerous Courts of Appeals had already recognized that providing an expert "necessary for an adequate defense" under the Criminal Justice Act meant providing an expert who was independent of the prosecution. *See, e.g., United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971).

Fifth, the Court expressly envisioned *ex parte* proceedings when describing the threshold showing required for expert assistance. *Ake*, 470 U.S. at 82-83. The purpose of such proceedings is to ensure that indigent defendants, in making a showing of need for expert assistance, are not forced to divulge privileged and confidential information and strategic considerations that financially secure defendants would keep confidential. There would be no reason for a defendant to proceed *ex parte* in a request for expert assistance if the end result was the appointment of an expert who would share the defense's information and strategy with the prosecution.

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The governing principle of *Ake* is that due process requires a mental health expert who can assist the defense by performing the specific tasks delineated in the opinion, which include consultation and preparation with defense counsel and thus necessarily require independence from the prosecution.

The Eleventh Circuit and many other courts have recognized that *Ake* requires an independent expert. *See, e.g.*, *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985). However, the Eleventh Circuit held in this case that the right to such an expert was not "clearly established" in *Ake* because the Fifth Circuit has declined to recognize the right and the Sixth Circuit has recognized it but held that it was not clearly established in *Ake*. J.A. 34a. These cases misinterpreting *Ake* do not undermine the principles that *Ake* clearly articulated. Even the Alabama Court of Criminal Appeals, which held in this case that McWilliams was not entitled to an independent expert, has since held that *Ake* was "clear" in requiring exactly that. *See Morris v. State*, 956 So. 2d 431, 447 (Ala. Crim. App. 2005).

The absence of an independent expert rendered McWilliams unable to present any mitigating evidence on the only significant factor at the sentencing: his mental health. The sentencing judge found that there were "no mitigating circumstances," J.A. 189a, despite having received a neuropsychological report indicating that McWilliams suffered from brain damage and records

showing that state doctors were medicating McWilliams with psychotropic drugs. An expert assisting the defense would have explained in lay terms to defense counsel how to present the diagnoses and information in the report and records as mitigating circumstances. Consideration of McWilliams's brain damage and other mental health issues was essential to a fair and reliable sentencing determination. Because neither judge in the majority below considered the ways in which McWilliams would have developed and presented his mitigation case if he had been provided the independent expert assistance required by *Ake*, remand to the Eleventh Circuit is warranted.

ARGUMENT

I. THE RIGHT TO THE ASSISTANCE OF AN INDEPENDENT MENTAL HEALTH EXPERT WAS CLEARLY ESTABLISHED BY *AKE V. OKLAHOMA*.

This Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that the Due Process Clause of the Fourteenth Amendment guarantees an indigent defendant whose mental health is a significant issue a competent expert to "assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. The words the Court chose to express its holding leave no doubt that defendants in these circumstances are entitled to an expert who assists in the development and presentation of the defense case, and who operates independently of the prosecution. To "assist" is to "help" or to "give support

or aid."[10] The Court also provided specific and detailed guidance as to what this due process right to "assistance" encompasses: the expert is expected to "gather facts, through professional examination, interviews, and elsewhere," *id.* at 80; "analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior," *id.*; "determine whether the insanity defense is viable," *id.* at 82; "assist in preparing the cross-examination of a State's psychiatric witnesses," *id.* at 82, since the expert would "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," *id.* at 80; and "translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand," *id.* As this Court held, the Due Process Clause requires such assistance to ensure that the defendant "has a fair opportunity to present his defense." *Id.* at 76.

After observing that "[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, [and] on cure and treatment," *Ake*, 470 U.S. at 81, this Court made clear that a mental health expert working exclusively for the defense was essential to the proper functioning of the adversary process: "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light

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10. *See Oxford American Dictionary* 36 (1980) ("to help"); *Webster's Third New International Dictionary* 132 (1976) ("to give support or aid").

of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* (emphasis added).

The right established in *Ake* followed from the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and other decisions that guarantee a criminal defendant the basic rights necessary to ensure the proper functioning of the adversary process.[11] Summarizing those decisions, this Court stated:

> [F]undamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly *within the adversary system*." To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 77 (citations omitted) (emphasis added). In *Ake*, the Court identified an independent mental health expert—an expert who gathers information for the defense, assists counsel in pursuing the proper defense

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11. Those decisions include *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956), establishing the right to transcripts necessary for an appeal; *Douglas v. California*, 372 U.S. 353, 357-58 (1963), establishing the right to counsel on the first direct appeal as of right; *Strickland v. Washington*, 466 U.S. 668, 687 (1984), holding that defense counsel at trial must be effective; and *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985), holding that appellate counsel must be effective. *Ake*, 470 U.S. at 76.

theory, advises counsel on how to cross-examine the prosecution's experts, and provides other confidential consultation—as one of those basic tools essential to ensuring that a criminal defendant can participate fairly in the adversarial process.

Ake itself thus clearly establishes that a criminal defendant has the right to an expert who works closely with the defense and independently of the prosecution. The Alabama Court of Criminal Appeals failed to apply this law in holding that *Ake* entitled McWilliams only to the assistance of a competent mental health expert, even though the expert was shared with the prosecution. J.A. 106a. That decision was contrary to and an unreasonable application of the clearly established law set forth in *Ake*.[12]

A. *Ake* Clearly Established a Due Process Right to the Assistance of an Expert Who Is Independent of the Prosecution.

Ake itself and this Court's contemporaneous understanding of the nature of the *Ake* right confirm that the case clearly established a right to an expert who will assist the defense and operate independently of the prosecution.

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12. As this Court has explained, "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citations omitted).

First, the facts and language of *Ake* make clear that a defendant is entitled to the assistance of an independent expert. In *Ake*, the defendant was evaluated by neutral mental health professionals who worked for the state hospital, and the evaluations of those experts were presented as evidence at trial and sentencing. *Ake*, 470 U.S. at 71-73. The trial court denied the defendant's request for expert assistance based on *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), in which "neutral psychiatrists" had examined the defendant and this Court found that no additional expert assistance was necessary. *Ake*, 470 U.S. at 84-85. In reversing and ordering a new trial, this Court rejected a neutral evaluation of this kind as insufficient to meet the requirements of due process. *Id.* at 86-87. Rather, in light of the Court's "increased commitment to assuring meaningful access to the judicial process," *id.* at 85, an indigent defendant is entitled to an independent expert to assist the defense, including in trial preparation, *id.* at 83-85.

The responsibilities of an expert set out in *Ake*, including evaluating potential strategies and "preparing the cross-examination of a State's psychiatric witnesses," *id.* at 82, can be carried out effectively only if the expert is independent of the prosecution and assisting the defense. As Judge Wilson observed in dissent below, it would make a mockery of the right guaranteed in *Ake* to suggest that it would be satisfied by an expert who helps the defense prepare for cross-examination of the State's experts, "only to cross the aisle and disclose to the State the future cross-examination of defense counsel." J.A. 57a. And it would be an even greater mockery if that expert testified for the prosecution. Likewise, it would be plainly contrary to the defendant's interests and to

the basic operation of our adversarial system of justice—and perhaps even a violation of professional ethics[13]—for defense counsel to consult with an expert who is free to share counsel's knowledge and strategic considerations with the prosecution. The prosecution and defense can no more share the same expert than they can share the same lawyer.[14]

Throughout its opinion, the Court emphasized the importance of expert assistance to the adversary process, which necessarily means that the expert must be working with the defense and independently of the prosecution. It observed that "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view," *Ake*, 470 U.S. at 84—that is, a view "opposing" the prosecution's expert—and it stated that the factfinder in a criminal case "must resolve differences in opinion within the psychiatric profession on the basis of the evidence

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13. The American Bar Association has long recognized that "[w]hen providing consultation and advice to the prosecution or defense on the preparation or conduct of the case, the mental health or mental retardation professional has the same obligations and immunities as any member of the prosecution or defense team." ABA Criminal Justice Mental Health Standards § 7-1.1(c) (1984). That includes the duty of confidentiality. *See* ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983).

14. Although the Court stated that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking," *Ake*, 470 U.S. at 83, it made clear that its concern was ensuring the provision of an expert who would function in the same essential role as a retained expert if the defense were able to afford one, *id.* at 80-82 (explaining the various tasks a mental health expert undertakes).

offered *by each party*," *id.* at 81 (emphasis added).[15] When addressing the penalty phase of the trial in *Ake*, the Court explained that it had upheld the practice of permitting psychiatric testimony on the issue of future dangerousness in capital sentencing "where the defendant has had access to an expert *of his own*." *Ake*, 470 U.S. at 84 (citing *Barefoot v. Estelle*, 463 U.S. 880, 899 n.5 (1983)) (emphasis added). This was based "on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'" *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 899). The Court held in *Ake* that an indigent defendant must have "access to a competent psychiatrist *for the purpose we have discussed*," *Ake*, 470 U.S. at 83 (emphasis added), so there is no separating its explanation of the expert's role from its holding in the case.

Second, the dissent of then-Justice Rehnquist in *Ake* confirms that *Ake* itself clearly established a defendant's right to assistance from an expert independent of the prosecution. Justice Rehnquist dissented precisely because he disagreed with the Court's holding that the Due Process Clause required the provision of an expert who would assist in "evaluation, preparation, and presentation of the defense," as the majority had held. *Id.* at 92 (Rehnquist, J., dissenting). In his view, "all the defendant should be entitled to is one competent

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15. *See also Ake*, 470 U.S. at 82 n.8 ("'[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.'") (quoting *Reilly v. Barry*, 166 N.E. 165, 167 (N.Y. 1929) (Cardozo, C.J.)).

opinion," *id.*, and "not to a defense consultant," *id.* at 87. If the majority meant only that a defendant was entitled to a neutral expert, Justice Rehnquist would have had no reason to dissent.

Third, decisions of this Court in the immediate aftermath of *Ake* further confirm that *Ake* itself clearly established a defendant's right to the assistance of an expert who is independent of the prosecution. The same year *Ake* was decided, the Court vacated and remanded a decision of the Virginia Supreme Court for consideration in light of *Ake*. *Tuggle v. Virginia*, 471 U.S. 1096 (1985). As the Court later explained, it vacated the decision because the prosecution presented psychiatric evidence to establish an aggravating circumstance, but the state court denied the petitioner assistance from a mental health expert. *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995). The Court confirmed that *Ake* established that in such instances, "due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Id.*

In like measure, the year after *Ake*, just months before McWilliams was sentenced to death, a plurality of this Court stated in *Ford v. Wainwright*, 477 U.S. 399 (1986):

> In *Ake v. Oklahoma* we recognized that, because "psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms," the factfinder must resolve differences in opinion within the psychiatric profession "on the basis of the evidence offered by each party" when

> a defendant's sanity is at issue in a criminal trial. The same holds true after conviction; *without any adversarial assistance from the prisoner's representative*—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information.

Id. at 414 (plurality opinion) (citations omitted) (emphasis added). Both *Tuggle* and *Ford* confirm that *Ake* established the right to an independent expert.

Fourth, the Court's reference in *Ake* to the federal Criminal Justice Act provides additional confirmation that a defendant's right to an expert who assists the defense and operates independently of the prosecution was clearly established in *Ake* itself. As the Court noted, the federal statute already provided for the assistance of all experts "necessary for an adequate defense." *Ake*, 470 U.S. at 79-80 (quoting 18 U.S.C. § 3006A(e)(1) (1982)).[16] In the years prior to *Ake*, numerous Courts of Appeals had recognized that providing an expert "necessary for an adequate defense" under the Criminal Justice Act meant providing an expert who was independent of the prosecution and

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16. The Criminal Justice Act stated, in relevant part: "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. § 3006A(e)(1) (1982).

available to assist in the evaluation and preparation of the defense. *See, e.g., United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971) ("[The appointed expert] supplies expert services 'necessary to an adequate defense,' which embraces pretrial and trial assistance to the defense as well as availability to testify. His conclusions need not be reported to either the court or the prosecution.").[17]

Finally, the Court in *Ake* expressly envisioned that a defendant would make "an *ex parte* threshold showing" of his need for a mental health expert. *Id.* at 82. The purpose of *ex parte* proceedings in this context is to ensure that indigent defendants are not forced to disclose attorney-client communications and work product that defendants of means would be able to keep confidential. *See Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970) ("The manifest purpose of requiring that the inquiry [for expert assistance for an indigent defendant] be ex parte is to insure that the defendant will not have to make a premature disclosure of his case."); *Ex parte Moody*, 684 So. 2d 114, 120 (Ala. 1996) (holding that an

17. *See also, e.g., United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) ("[W]hen, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself."); *United States v. Bass*, 477 F.2d 723, 725-26 (9th Cir. 1973) ("[The expert] supplies expert services 'necessary to an adequate defense.' He can be a partisan witness. His conclusions need not be reported in advance of trial to the court or to the prosecution. And his services embrace pretrial and trial assistance to the defense as well as potential trial testimony."); *United States v. Shultz*, 431 F.2d 907, 911 (8th Cir. 1970) ("[T]he adversary system cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in the presentation of this issue to the jury.").

indigent defendant can proceed *ex parte* when requesting expert assistance under *Ake* because he "should not have to disclose to the state information that a financially secure defendant would not have to disclose"). There would be no point to suggesting that an indigent defendant would make a threshold showing outside the presence of the prosecution if the end result was the provision of an expert who was shared with the prosecution and free to disclose information.

B. Under this Court's Precedents Interpreting 28 U.S.C. § 2254, *Ake*'s Requirement of an Independent Expert Constitutes Clearly Established Law.

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).[18] As explained above, the right to an independent mental health expert and the responsibilities of that expert are clearly set forth in *Ake*.

This Court has held that *Strickland v. Washington*, 466 U.S. 668 (1984), which set the standard for ineffective assistance of counsel claims, clearly established the right to a defense attorney who conducts a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 521-23

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18. This Court decided *Ake* the year before McWilliams's trial, six years before the Alabama Court of Criminal Appeals issued its decision, J.A. 92a-179a, and eight years before the Alabama Supreme Court affirmed the ruling of the Court of Criminal Appeals without directly addressing the *Ake* claim, *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

(2003). *Ake* clearly established a related right—the right to an expert to assist in the "evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. Both cases were concerned with providing indigent defendants with "the raw materials integral to the building of an effective defense." *Id.* at 77. This Court was far more specific in *Ake* than it was in *Strickland*. Whereas *Strickland* provided a general reasonableness standard, *Ake* articulated the duties of the required expert in extensive and precise detail. Yet this Court determined in *Wiggins* that counsel's duty to conduct a "thorough investigation of the defendant's background" was clearly established in *Strickland*, *Wiggins*, 539 U.S. at 522, despite the argument that "[t]here was nothing in *Strickland*" that identified that precise duty, *id.* at 543 (Scalia, J., dissenting). If *Strickland* clearly established that the right to effective assistance of counsel encompasses the obligation of defense counsel to conduct a reasonable investigation of the defendant's background before making strategic choices about how to proceed at trial, then *a fortiori Ake* clearly established a criminal defendant's entitlement to an independent expert to assist in the preparation and presentation of the defense.

Similarly, in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), this Court identified clearly established law based on language far less clear than the language of *Ake*. Addressing capital jury instructions, the Court found clearly established principles by conducting a lengthy, detailed analysis of *Penry v. Lynaugh*, 492 U.S. 302 (1989), and other cases. *Abdul-Kabir*, 550 U.S. at 246-63.[19] That type of analysis is not necessary here. There

19. Chief Justice Roberts argued in dissent that if the law was clearly established by "our sharply divided, ebbing and flowing

is no ambiguity in *Ake*. This Court explained that the required expert must be available to assist the defense in specific ways, including assessing the prosecution's case, evaluating potential trial strategies, assisting counsel in preparing for cross-examination, and providing testimony when needed. *Ake*, 470 U.S. at 80-82. Those responsibilities cannot be met unless the expert is working independently of the prosecution. Therefore, *Ake* clearly established the right to an independent expert.

C. The Decisions of Lower Courts Confirm that *Ake* Clearly Established the Right to an Independent Expert.

Of the federal appellate courts that have considered the matter, the majority have read *Ake* to mean what it says: a defendant is entitled to an independent expert to assist the defense, and not merely to the report of a neutral mental health professional. The Eleventh Circuit reached that conclusion in *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), holding that "'[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate.'" *Id.* at 644 (quoting *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990)).

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decisions . . . it should not take the Court more than a dozen pages of close analysis of plurality, concurring and even dissenting opinions to explain what that 'clearly established law' was." *Id.* at 266-67 (Roberts, C.J., dissenting).

Cowley was tried the same year as McWilliams and, as in *McWilliams*, the Alabama trial court in *Cowley* appointed a psychiatrist who was shared by the prosecution and the defense. *Cowley*, 929 F.2d at 641, 644. That psychiatrist testified for the prosecution that Cowley was competent to stand trial and sane when he committed the offense. *Id.* at 641. A jury found him competent, and another jury rejected the insanity defense and found him guilty. *Id.* The Eleventh Circuit granted relief, finding that the psychiatrist "did not assist in Cowley's trial preparation"—such as by "conducting 'a professional examination on issues relevant to the defense,' [and] presenting testimony"—"and obviously could not have assisted Cowley in his own cross-examination." *Id.* at 644 (quoting *Ake*, 470 U.S. at 82). The case illustrates that, as the Court recognized in *Ake*, a "neutral" expert shared by both sides simply does not work in our adversary system and therefore does not satisfy the requirement of due process.[20]

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20. *See also Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), where the court reviewed a case in which the trial judge denied an independent expert and instead appointed a "friend of the court" psychologist who testified against the defendant at a competency hearing and, after the judge denied a continuance at sentencing for further testing, testified that she had not performed the requisite tests to confirm organic brain dysfunction. The court held that appointment of the "neutral psychological expert" was not sufficient to satisfy *Ake*. *Id.* at 382-84, 392.

Consistent with *Cowley*, the Third,[21] Seventh,[22] Ninth,[23] and Tenth[24] Circuits also have recognized that *Ake* requires an independent expert to assist the defense.[25] Yet just months after *Cowley*, the Alabama Court of Criminal Appeals held in this case that McWilliams was not entitled to an independent expert because "the requirements of *Ake v. Oklahoma* . . . are met when the State provides the appellant with a competent psychiatrist." J.A. 106a.

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21. *See Szuchon v. Lehman*, 273 F.3d 299, 318 (3d Cir. 2001) (recognizing that because the expert appointed by the court "was not appointed to assist the defense," his involvement did not satisfy *Ake*).

22. *See United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989) ("The independent psychiatric expert . . . can aid a defendant in determining whether a defense based on mental condition is warranted . . . [and] 'assist in preparing the cross-examination' of psychiatric experts retained by the government.") (quoting *Ake*, 470 U.S. at 1096).

23. *See Smith v. McCormick*, 914 F.2d 1153, 1158-59 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process . . . . Smith was entitled to his own competent psychiatric expert.").

24. *See United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986) (holding that the defendant was entitled to his own mental health expert to assist the defense even though "four treating or court-appointed psychiatrists testified"); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

25. The courts in these cases, like the Eleventh Circuit in *Cowley*, were not called upon to make a determination as to whether the right to an independent expert was "clearly established" under 28 U.S.C. § 2254(d), but they all understood *Ake* itself to provide for that right.

Despite its decision in *Cowley*, the Eleventh Circuit denied McWilliams relief on habeas review, holding that the right to independent expert assistance was not "clearly established" for purposes of 28 U.S.C. § 2254(d)(1). J.A. 34a. The court's only justification for this conclusion was that "[i]n some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*," citing *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), and *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), while "[o]ther circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*," citing *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985), and the case it had relied upon previously in *Cowley*, *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990). J.A. 34a.

The disagreement noted by the Eleventh Circuit traces to the outlier decision of the Fifth Circuit in *Granviel*. There, the Fifth Circuit relied on the pre-*Ake* reasoning of the Texas Court of Criminal Appeals to hold that "'[a] psychiatrist's examination is not an adversary proceeding,'" *Granviel*, 881 F.2d at 191 (quoting *Granviel v. State*, 552 S.W.2d 107, 115 (Tex. Crim. App. 1976)), and thus the "[a]vailability of a neutral expert" is sufficient to satisfy *Ake*, *Granviel*, 881 F.2d at 192. That decision was incompatible with *Ake* from the start. In fact, the Texas Court of Criminal Appeals later repudiated its own prior reasoning and disavowed the Fifth Circuit's *Granviel* decision, stating:

> In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist.

> It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts.

De Freece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993). The Court concluded, "it appears that, *Granviel v. Lynaugh* notwithstanding, the greater weight of authority holds otherwise. And, in our view, with good reason." *Id.* at 158.

Nevertheless, the Fifth Circuit's misinterpretation of *Ake* in *Granviel* has influenced the way some courts view what was "clearly established" in *Ake*. Both the Sixth and Eleventh Circuits have recognized the due process right to an independent expert, *see Miller*, F.3d at 699; *Cowley*, 929 F.2d at 644, but they have declined to hold that *Ake* clearly established that right under § 2254(d)(1), largely based on *Granviel*, *see Miller*, F.3d at 698; J.A 34a.[26] The fact that the Fifth Circuit misconstrued *Ake* in its *Granviel* decision does not undermine the principles that *Ake* clearly and expressly articulated. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[T]he mere existence

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26. The Sixth Circuit noted that the Fifth Circuit's decision in *Granviel* "deviated from the decisions of other Courts of Appeals, which had held that a defendant was entitled to independent, non-neutral psychiatric assistance." *Miller*, 694 F.3d at 697. Yet the Sixth Circuit used that deviation as a basis for holding that *Ake* did not clearly establish the right to an independent expert for purposes of § 2254(d)(1). *Id.* at 699.

of conflicting authority does not necessarily mean a rule is new.") (citations and quotation marks omitted); *Hall v. Zenk*, 692 F.3d 793, 802 (7th Cir. 2012) (declining to find that the contrary decisions of other circuits meant that a principle was not clearly established where those decisions "constitute an unreasonable interpretation of Supreme Court law").

Since its decision in this case, the Alabama Court of Criminal Appeals has recognized that *Ake* made clear that an independent expert is required. *Morris v. State*, 956 So. 2d 431 (Ala. Crim. App. 2005). Morris, like McWilliams, had been medicated with antipsychotic drugs during his pretrial incarceration. The court observed that "even though Morris was treated with antipsychotic medication while he was at Taylor Hardin, he was forced to proceed to trial and was convicted and sentenced to death without the assistance of an independent mental-health expert." *Id.* at 452-53. It stated:

> [T]he Supreme Court made it clear [in *Ake*] that, once an indigent defendant had established that his sanity was likely to be a significant issue at trial, he is entitled to an independent expert—an expert devoted to assisting his defense and one who is not providing the same information or advice to the court and to the prosecution. One of the most crucial decisions a defense expert can provide assistance with is whether a mental-health defense is viable and, if so, how best to present it to the jury. Certainly, it is unreasonable to expect that a neutral expert who reports to the court and to the parties would provide the same degree of assistance

> to a defendant as could be expected from the defendant's own independent expert.

Id. at 447-48. For that reason, the court reversed his conviction and death sentence. *Id.* at 453.

The Alabama court, like others, recognized not only that *Ake* clearly established a right to an independent expert to assist the defense, but also that failure to follow *Ake*'s requirement of independence was completely impractical and incompatible with the adversary system.[27] Ultimately, however, regardless of what any lower court decisions might say, it is plain on the face of this Court's opinion in *Ake* that it established the right that McWilliams asserts here.

II. A REMAND TO THE ELEVENTH CIRCUIT IS WARRANTED BECAUSE NO COURT HAS ADDRESSED THE EFFECT AN INDEPENDENT EXPERT WOULD HAVE HAD ON McWILLIAMS'S SENTENCING.

After finding that *Ake* clearly established the due process right that McWilliams was denied in this case, this Court should follow its usual practice and remand to the

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27. *See also, e.g., Moore v. State*, 889 A.2d 325, 348 (Md. 2005) ("[T]he State must, at a minimum, assure the defendant access to a defense expert who will assist in evaluation, preparation, and presentation of the defense."); *State v. Harris*, 859 A.2d 364, 444 (N.J. 2004) ("A defendant would be disadvantaged in exposing shortcomings in a court-appointed expert's testimony without expert consultation."); *Holloway v. State*, 361 S.E.2d 794, 796 (Ga. 1987) ("Holloway was entitled to the kind of independent psychiatric assistance contemplated in *Ake v. Oklahoma* . . . .").

Eleventh Circuit for a determination of whether that error had a substantial and injurious effect. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015) (vacating the judgment and remanding after holding that the petitioner "has satisfied the requirements of § 2254(d)"); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) ("Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*."); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) ("[W]e are a court of review, not of first view.") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Because that determination will involve case-specific facts and circumstances, it is a matter appropriately resolved by the courts below.

The judgment of the Eleventh Circuit in this case cannot be upheld on the basis of the statement in the court's per curiam opinion that "even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence." J.A. 36a. That ruling rests on, and flows from, an incorrect legal premise. The Eleventh Circuit reached its conclusion by considering only whether the defense would have benefited from further consultation with Dr. Goff, the expert who reported his findings simultaneously to the judge, the prosecution, and the defense two days before the judicial sentencing hearing. The Eleventh Circuit stated, "A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime."

J.A. 36a.[28] In his concurrence, Judge Jordan added, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." J.A. 49a. As neither judge who made up the majority below considered the ways in which McWilliams would have developed and presented his mitigation case if he had been provided an independent expert *to assist the defense*, as *Ake* requires, remand is warranted.[29]

In the event that this Court addresses whether the denial of an expert had a substantial and injurious effect on the outcome, the lack of an expert made it impossible for McWilliams to present any mitigating evidence on the only significant factor at the sentencing phase, his mental impairments.[30] That, in turn, made it impossible for the court, which found no mitigating circumstances, J.A. 189a, "to consider and give effect to [mitigating] evidence in imposing sentence, so that the sentence imposed . . . reflec[ts] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v.*

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28. There was not a "mountain of evidence" undercutting McWilliams's mental illness. Moreover, evidence of mental health issues is mitigating regardless of whether it relates to the commission of the crime. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004).

29. The magistrate's report, adopted by the district court, found that McWilliams was not entitled to an independent expert and did not address prejudice. *See* D. Ct. Doc. 55 at 79-81 (Feb. 1, 2008).

30. As Judge Wilson observed in finding that McWilliams was prejudiced by the denial of independent expert assistance, the defense "case for mitigation was based on his mental health history." J.A. 58a.

Johnson, 532 U.S. 782, 788 (2001) (citations and quotation marks omitted) (emphasis and alterations in original).

In the report delivered to the prosecution, defense, and judge less than forty-eight hours before sentencing, Dr. Goff stated that McWilliams had "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634. Dr. Goff reached his conclusion by administering various tests to McWilliams, including the Halstead-Reitan Neuropsychological Battery, which in 1986 was "the most widely utilized method of inferring neuropsychological functioning"[31] and "one of the best standardized methods of identifying patients with brain damage."[32] Dr. Goff concluded that McWilliams had "genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction," indicative of "a right hemisphere lesion." T. 1635-36. Physical manifestations of this dysfunction included "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636.

However, as Judge Wilson pointed out in his dissent, defense counsel did not have the time or expertise to achieve "the basic level of understanding of the report needed to use it" at the sentencing hearing. J.A. 56a. As a result, Dr. Goff was not called as a witness, and no one explained his assessment. The sentencer thus lost "'the

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31. Raymond S. Dean, *Review of Halstead-Reitan Neuropsychological Test Battery* 9 (Buros Center for Testing, Lincoln, NE, 1985).

32. Richard L. Strub & F. William Black, *The Mental Status Examination in Neurology* 181 (1985).

substantial benefit of potentially probative information,' resulting in 'a much greater likelihood of an erroneous decision.'" J.A. 57a n.2 (Wilson, J., dissenting) (quoting the portion of *Ford v. Wainwright*, 477 U.S. 399, 414 (1986), discussing the application of *Ake*).

As Judge Wilson observed, "Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*." J.A. 55a. With Dr. Goff's report rendered a nullity, it is not surprising that the trial judge concluded that McWilliams was "feigning, faking, and manipulative" and did not have any genuine mental health issues. J.A. 188a. Despite mentioning the unexplained report in his sentencing order, the judge based his opinion on his own review of McWilliams's medical records, J.A. 188a, 211a, and on the views of the state doctors, who testified at the penalty phase before the jury that McWilliams had malingered on the MMPIs they reviewed, *see* J.A. 185a-186a; T. 1354, 1368-69.

Independent expert assistance would have enabled counsel to educate the judge about McWilliams's brain damage and counter the suggestion that McWilliams was "feigning" and "faking" mental illness. The presence of brain damage affects the conclusions that can be drawn from MMPI results, particularly with respect to malingering.[33] Once Dr. Goff determined that McWilliams

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33. *See, e.g., Textbook of Traumatic Brain Injury* 215-16 (Jonathan M. Silver, M.D. *et al.* eds., 2d ed. 2011) ("Use of the MMPI in individuals with TBI [traumatic brain injury] has been specifically cited as having potentials for misdiagnosis. . . . The Fake Bad scale has been criticized for its bias in gender-based symptoms as well as neurological symptoms commonly

had brain damage—a fact unknown to the state doctors who administered the MMPI—their opinions regarding the MMPI results should have carried far less weight. Even considering the MMPI results, a defense expert could have explained why McWilliams scored high on the scales meant to detect malingering despite having serious mental health issues, as Judge Wilson explained in his dissent below.[34]

A proper understanding of the Halstead-Reitan Battery would have further undermined the judge's misperception about McWilliams's mental health. With expert assistance, defense counsel could have shown that a neuropsychologist like Dr. Goff would not be misled easily by the type of "faking" the judge imagined. It is virtually impossible for a lay person to manipulate the instruments Dr. Goff employed to reflect a consistent profile of brain

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experienced by those with TBI."); *see also* Sureyya Dikmen & Ralph M. Reitan, *MMPI Correlates of Adaptive Ability Deficits in Patients with Brain Lesions*, 165 J. of Nervous & Mental Disease 247, 253 (1977) (recommending that caution be exercised when interpreting MMPI results for neurological patients until more sensitive scales are devised).

34. Judge Wilson explained: "[W]ith appropriate assistance, [McWilliams] would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a 'cry-for-help.' He then explained the difference between a 'fake-bad' and a 'cry-for-help' diagnosis; the former is 'someone attempting to make themselves look worse,' and the latter, while seemingly 'very similar' to the former, actually reflects 'significant psychiatric and psychological problems.'" J.A. 60a-61a.

damage in the right cerebral hemisphere.[35] A defense expert also could have assisted counsel in discovering and explaining why the psychotropic medications that were being administered to McWilliams at Holman Prison were prescribed.

The mitigating evidence that McWilliams would have presented is particularly compelling. As the Tenth Circuit has explained: "Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect." *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) (referencing, among other cases, *Rompilla v. Beard*, 545 U.S. 374, 392 (2005), and *Penry v. Lynaugh*, 492 U.S. 302, 307, 328 (1989)).[36]

Where the federal appellate courts have found *Ake* errors involving evidence similar to the evidence

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35. *See, e.g.*, Ronald A. Goebel, *Detection of Faking on the Halstead-Reitan Neuropsychological Test Battery*, 39 J. of Clinical Psychol. 731, 740-41 (1983) (describing his study that "offer[s] further support for the belief of many clinical neuropsychologists that nonimpaired individuals of at least average IQ cannot sufficiently alter their performances on neuropsychological assessment to appear brain-impaired with any significant degree of success").

36. *See also Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) ("If the medical opinion testimony in this case—that Lockett suffered from some organic brain disorder that tended to explain his violent conduct and made him less able to control his behavior than a normal person—had been presented to the jury, we think a reasonable juror could have found that his particular mental condition, which resulted from no fault of his own, made him less morally culpable for his cruel and senseless crime.").

available in McWilliams's case, they have found the errors prejudicial. For example, in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), the court granted relief where the defendant was denied an independent expert to "conduct the type of testing and evaluation that was required to diagnose [him] with organic brain damage for the purposes of showing the effect of that factor" at sentencing. *Id.* at 395. Similarly, in *Castro v. Oklahoma*, 71 F.3d 1502 (10th Cir. 1995), the court granted relief where the defendant was denied an expert to present his mental health evidence, which included "right frontal and possibly right temporal brain dysfunction." *Id.* at 1510, 1516.

Mental health experts, in contrast to lay witnesses, "can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." *Ake*, 470 U.S. at 80. Had McWilliams received the expert assistance *Ake* requires, his organic brain damage would have played an integral role within a compelling mitigation case. Instead, as Judge Wilson observed, "McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence." J.A. 58a. As a result, the court "heard almost nothing that would humanize [McWilliams] or allow [it] to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). Therefore, the absence of an independent mental health expert had a substantial and injurious effect on McWilliams's sentencing. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand this case for further proceedings.

Respectfully submitted,

DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

JOSHUA S. MELTZER
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

STEPHEN B. BRIGHT
Counsel of Record
MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 29 2017
OFFICE OF THE CLERK

No. 16-5294

In the Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,
Petitioner,
v.
JEFFERSON DUNN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

STEVEN T. MARSHALL
Alabama Attorney General

Andrew L. Brasher*
Solicitor General
*Counsel of Record

Henry M. Johnson
Megan A. Kirkpatrick
Assistant Attorneys General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

March 29, 2017

CAPITAL CASE
QUESTION PRESENTED

Whether, when this Court held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," it clearly established that the expert should be independent of the prosecution.

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INTRODUCTION

One need not examine *Ake* in any great detail to answer the question in this case—a simple timeline will do. James McWilliams murdered Patricia Reynolds in 1984. In 1985, this Court held in *Ake* that the State's obligation to provide the "basic tools of an adequate defense" includes "access to a psychiatrist's assistance." In 1986, the Eleventh Circuit held that this obligation could be satisfied by a neutral nonpartisan psychiatrist. That same year, the Fifth Circuit agreed with the Eleventh. Other courts agreed; some disagreed. By 1993, commentators declared this question about the disinterestedness of the psychiatrist to be the "preeminent ambiguity in the [*Ake*] opinion." Kerrin Maureen McCormick, *Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of* Ake, 30 AM. CRIM. L. REV. 1329, 1356 (1993).

This ambiguity in the *Ake* opinion remained in the early 1990s when McWilliams's conviction became final. In the years since *Ake*, this Court was asked to resolve this and other ambiguities in that opinion on at least four occasions. But, each time, the Court declined to grant certiorari over the dissent of *Ake*'s author, Justice Marshall.

We submit that, against this backdrop, it strains both logic and common sense to suggest that federal law, as determined by this Court, "clearly established" a criminal defendant's right to a partisan mental health expert at the time of the relevant state court decision in this case. A split in the lower courts at the time of a state court decision is near-conclusive evidence that the law was not clearly es-

tablished for federal habeas purposes. And the court of appeals here was correct that *Ake*'s dictates were, at best, ambiguous when the state courts affirmed McWilliams's conviction more than twenty years ago.

Nonetheless, even an independent examination of *Ake* shows that the court of appeals was right to reject this argument. *Ake* does not use the words "independent," "partisan," or "consulting." Because the defendant in *Ake* was afforded no psychiatric assistance *of any kind*, the issue of what kind of psychiatric assistance due process required was not presented in that case. The Court suggested that the State must provide psychiatric assistance at sentencing "when the State presents psychiatric evidence of the defendant's future dangerousness." *Ake*, 470 U.S. at 83. But the Court did not address the question presented here: whether due process requires a continuance for counsel to consult a partisan psychiatrist about tests he ordered from a neutral expert.

In any event, McWilliams's trial was consistent with due process. At his request, McWilliams was evaluated before trial by three separate psychiatrists for over a month for the express purpose of developing mitigating evidence. And, although McWilliams's brief elides this fact, a consulting psychiatrist assisted his counsel at the time of sentencing. At her suggestion, McWilliams asked to be tested by a fourth expert, with the results of those tests provided to his counsel and the court before the judicial sentencing hearing. Although the trial court declined to continue the sentencing hearing so that McWilliams's counsel could seek yet another round of expert assistance, the denial of that request did not violate due process.

STATEMENT

James Edmond McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds in 1984. Reynolds was a clerk at a convenience store. McWilliams went into the store, locked the front doors, took Reynolds's money, forced her into a back room, brutally raped her, then shot her with a .38 caliber pistol. She had sixteen gunshot wounds (eight entrance and eight exit) and numerous other injuries. She bled to death early the following morning. Eyewitnesses placed McWilliams at the scene. He was later apprehended driving a stolen car with the murder weapon in his possession. McWilliams was found guilty and sentenced to death in 1986.

A. Three psychiatrists evaluated McWilliams, and he asserted mental illness at the penalty phase of trial.

Before trial, McWilliams moved the court to "institute a careful investigation" into his sanity and order a psychiatric evaluation "to contain statements relating to the statutory mitigating circumstances." T. 1526–27.[1] The trial court granted his motion and ordered that McWilliams be evaluated by a "lunacy commission." T. 1528–30. The order expressly directed the commission to evaluate and report on "the Defendant's mental condition as it relates to the mit-

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[1] For ease of reference, record citations follow the convention outlined in McWilliams's blue brief. *See* Pet. Br. at 3 n.1.

igating circumstances" referenced in McWilliams's motion. T. 1529.

McWilliams was transported to a secure mental hospital, where he was evaluated by three psychiatrists for more than a month. T. 1543–47. He "underwent a comprehensive, interdisciplinary evaluation," including a "Nursing Serving Assessment, Physical Examination, Psychological Assessment, and Psychiatric Mental Status Examination." T. 1544. The psychiatrists submitted a report to the court with a summary of their findings.

After this month-long evaluation, none of the three psychiatrists diagnosed McWilliams with a mental illness at the time of the evaluation or at the time of the crime. Two of the psychiatrists specifically concluded that he did not exhibit any "psychiatric symptoms" that "would provide a basis for mitigating factors at the time of the alleged crime." T. 1546. One of the psychiatrists concluded that he was malingering. T. 1545. Dr. Fe Yumul reported that McWilliams "denied experiencing hallucinations or delusions," but he noted that "[t]here was some indication from the defendant that he had previously experienced auditory hallucinations (heard imaginary voices) four years ago." T. 1544. Dr. Kamal Nagi described McWilliams as "evasive" and "overly dramatic," and he stated his "opinion that Mr. McWilliams is grossly exaggerating his psychological symptoms to mimic mental illness." T. 1545–46. He diagnosed McWilliams with drug and alcohol abuse and character disorder, mixed with antisocial features. T. 1545. Finally, Dr. Bernard Bryant noted that McWilliams reported amnesia at the time of the murder, but he

found that "there was not evidence of psychiatric symptoms." T. 1546.

After McWilliams was found guilty of capital murder, there was a penalty phase proceeding before the jury. As aggravating circumstances, the State relied on the jury's guilt-phase findings that the murder was committed in the course of a robbery and rape. The State also presented evidence that McWilliams had previously been convicted of a separate robbery and rape. T. 1300–01.

After the State's presentation, McWilliams injected the issue of his purported psychological problems into the case. McWilliams's mother testified about a head wound he received when he was six years old, after which he "started having headaches and things, and he went to the doctor." T. 1304–05. McWilliams himself described head injuries, which caused headaches when he was young. T. 1323. He testified that a doctor diagnosed him with "atypical paranoid disorder with schizoid features" and recommended "inpatient treatment." T. 1325–26. McWilliams read a report from his medical records, in which a doctor diagnosed him as "a severely disturbed individual." T. 1331. The report also said that McWilliams's test score "on the surface" indicated "the test results" were "invalid due to faking." T. 1329–30, 1333.

The State called two rebuttal witnesses: (1) a psychiatrist who had evaluated McWilliams pursuant to the court's earlier order and (2) a psychologist who performed one of the tests ordered by the psychiatrist. The psychiatrist testified that McWilliams did not suffer from psychosis or a mental defect. T. 1340, 1345–46. The psychologist testified that

McWilliams exaggerated or faked his symptoms on the Minnesota Multiphasic Personality Inventory ("MMPI") conducted during his evaluation. T. 1363.

The jury recommended a sentence of death by a vote of 10 to 2. Under Alabama law, a jury's verdict recommending a sentence of death is not binding on the trial court, although "the trial court shall consider the recommendation." ALA. CODE § 13A–5–47(e). The judge set a judicial sentencing hearing for a later date, at which a probation officer would testify and the parties would present argument. J.A. 190a–214a.

B. With the help of a partisan consulting psychologist, McWilliams requested, and the trial judge granted, additional testing before the judicial sentencing hearing.

At some point in the case, McWilliams's counsel consulted with a psychologist employed at the University of Alabama named Marianne Rosenzweig.[2] Dr. Rosenzweig had "volunteer[ed]" to help him on the case. P.C.T. 251–52. In the words of trial counsel, she "assist[ed]" him "with interpretation and understanding of existing records." P.C.T. 252. She believed that there was "nothing" in the lunacy commission's records that "was going to be useful in mitigation." P.C.T. 252. But "through her efforts," trial

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[2] Dr. Rosenzweig's assistance was disclosed on post-conviction review when McWilliams alleged that his trial lawyers were ineffective.

counsel requested an additional "neuropsychological review" for potential "organic brain damage." P.C.T. 252.

Specifically, after the penalty phase but before judicial sentencing, trial counsel moved the court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant . . . and to order at least that the Defendant be given an EEG, Luria and Bender-Gestalt, *with the results made available to the court.*" T. 1615 (emphasis added). The court granted this motion the same day it was filed. T. 1612.

Dr. Paul D. Bivens, an employee of the prison system, administered the Bender Visual Motor Gestalt Test to McWilliams. In a letter to the trial court, Dr. Bivens stated that McWilliams's performance on that test was "equivocal" and could indicate malingering, a possible organic impairment, or a possible psychological impairment. T. 1621. Because the prison system did not have all the tests described in the court's original order, the court ordered further tests outside of the prison system. T. 1616–17, 1620.

Accordingly, McWilliams was re-admitted to a secure mental facility, and Dr. John R. Goff, a clinical neuropsychologist who was then serving as the Chief of Psychology at a mental hospital, evaluated him. T. 1631–43. In a report summarizing his findings and conclusions from his evaluation, Dr. Goff observed that McWilliams suffered from "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636. Based on those symptoms, Dr. Goff found that

McWilliams had "some genuine neuropsychological problems," and he explained that those problems likely were the result of "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634–35.

But Dr. Goff concluded that McWilliams was malingering with regard to his alleged emotional and psychological problems. Indeed, Dr. Goff stated that McWilliams "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems" and that "it is quite obvious . . . that his symptoms of psychiatric disturbance are quite exaggerated and, perhaps, feigned." T. 1635. McWilliams performed so poorly on some of the tests that Dr. Goff concluded that McWilliams did not put forth "his best effort." T. 1634. Dr. Goff also noted that McWilliams, whose stream of thought otherwise was "logical and coherent," "tended to stop in mid-sentence and adopt a very wide-eyed look." T. 1633. Dr. Goff further noted that McWilliams "claimed to have forgotten the alphabet," which was "doubtful." T. 1634. Dr. Goff's report was provided to McWilliams's counsel, the prosecution, and the trial court two days before the sentencing hearing. J.A. 193a.

On the morning of the hearing, McWilliams's counsel orally moved for an indefinite continuance. J.A. 194a. McWilliams's medical records from the Department of Corrections had been delivered shortly before the hearing. J.A. 191a–92a. When trial counsel suggested that he needed time to review those records and Dr. Goff's report or "have the records reviewed by anyone else," the court delayed the sentencing hearing until the afternoon. J.A. 191a–

94a, 204a–11a. The court explained: "The [c]ourt will entertain any motion that you may have with some other person to review it. Otherwise, [t]he [c]ourt will pronounce sentence at 2 o'clock." J.A. 205a. McWilliams's counsel did not move the court to appoint an expert, partisan or otherwise, to review Dr. Goff's report or the records. J.A. 205a–06a. Instead, he filed a motion to withdraw. T. 1644.

The sentencing hearing resumed at 2:15 p.m., and McWilliams's counsel renewed the motion for an indefinite continuance. J.A. 206a–07a. The trial court denied that motion. J.A. 207a. Dr. Goff's report was admitted into evidence. J.A. 205a. After closing argument, McWilliams's counsel again challenged the court's denial of a continuance, arguing that "we really need an opportunity to have the right type of experts in the field[] take a look at all of those records and tell us what is happening with him." J.A. 207a. The court responded that it had "given [counsel] the opportunity to make a motion to present someone to evaluate that," presumably referring to Dr. Goff's report and McWilliams's other records. J.A. 211a–12a. Trial counsel never made such a motion. J.A. 207a–08a, 211a–12a.

The trial court followed the jury's recommendation and sentenced McWilliams to death. J.A. 182a, 189a. The court found three aggravating factors: (1) McWilliams's extensive criminal history, including his prior convictions for rape and robbery, (2) that the murder was committed during a rape and robbery, and (3) that the murder was especially heinous and cruel because of "the execution-style slaying of the victim," the "number of times the victim was shot after having been brutally raped," and

McWilliams's "obvious lack of regard or compassion" for the victim. J.A. 182a–84a. As to mitigation, the court "reviewed" the "results of neurological and neuropsychological testing." J.A. 188a. The court found "that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment," but that he was also "feigning, faking, and manipulative." *Id.* The court found that, even if McWilliams's organic brain dysfunction "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." *Id.*

C. After the state courts affirmed his sentence, McWilliams presented additional psychological evidence.

McWilliams appealed his conviction and sentence to the Alabama Court of Criminal Appeals, which affirmed in 1991. The court explained that the use of psychiatric testimony at the penalty phase followed the pattern that this Court had approved in *Buchanan v. Kentucky*, 483 U.S. 402 (1987). There, this Court held that, if a capital defendant requests a psychological evaluation, "the prosecution may rebut" the defendant's assertions about psychiatric problems "with evidence from the reports of the examination that the defendant requested." J.A. 103a (quoting *Buchanan*, 483 U.S. at 422).

With respect to the *Ake* issue, the court explained: "[t]he holding in *Ake v. Oklahoma* . . . requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assis-

tance." J.A. 105a. The State "met this requirement" when it provided "a competent psychiatrist." J.A. 106a. The court recounted that the trial court had granted two motions filed by McWilliams: it had "granted [his] motion and ordered a lunacy commission to evaluate" him, and it had granted another motion so that McWilliams "was examined by a neuropsychologist, Dr. John Goff." J.A. 99a–100a. "There is no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." J.A. 106a. Moreover, "the trial court indicated that it would have considered a motion to present an expert to evaluate this report," but McWilliams chose not to file one. *Id.* The state court also concluded that McWilliams "has demonstrated no prejudice by the trial court's denial of his motion for continuance." J.A. 112a.

After the Alabama Supreme Court granted certiorari and affirmed on other issues,[3] McWilliams filed a petition for post-conviction review under Alabama law, and he was granted an evidentiary hearing. At the hearing, the state post-conviction court heard testimony from Dr. George Woods, a psychiatrist from California who was retained by McWilliams's state post-conviction counsel, and from Dr. Karl Kirkland, a forensic psychologist who was retained by the State.

After evaluating McWilliams for approximately seven hours, Dr. Woods diagnosed him with "bipolar

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[3] *Ex parte McWilliams*, 666 So. 2d 90 (Ala. 1995); *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

affective disorder." P.C.T. 914, 986. Dr. Woods also explained that an MMPI test "has validity scales" that a clinician uses to determine if the subject (1) "is attempting to make themselves look worse" or "fake-bad," (2) is attempting to look better with a "fake-good," (3) has failed to understand the test, or (4) is exaggerating symptoms in a "cry-for-help." P.C.T. 936. Dr. Woods concluded that, during his interview with McWilliams, "it was my impression that he was not being truthful, that he was being grandiose." P.C.T. 1002. Dr. Woods also agreed that McWilliams was "deceptive," "manipulative," and his records reflected that he was a malingerer. P.C.T. 1002–05, 1023. Dr. Woods expressly agreed with much of Dr. Goff's assessment of McWilliams: "I have to say I think that Dr. Goff did an excellent job of attempting to separate out what were in fact exaggerations and what was real impairment." P.C.T. 955. "Dr. Goff accurately looked at those neuropsychological impairments that he felt were feigned and those neuropsychological impairments that he felt were real," and "he made that clear in his report." P.C.T. 958.

On rebuttal, the State called Dr. Kirkland. P.C.T. 1042, 1053. Dr. Kirkland diagnosed McWilliams with "an antisocial personality." P.C.T. 1082. McWilliams told Dr. Kirkland "about his choice to adopt a—what he described as a victimless criminal lifestyle in his late teens." P.C.T. 1084. Dr. Kirkland testified that, aside from Dr. Woods, no mental-health professional had ever diagnosed McWilliams with bipolar disorder and that McWilliams's medical records revealed that he had never been prescribed "a primary drug for bipolar

disorder such as Depakote or Lithium." P.C.T. 1089. Dr. Kirkland also testified that the month-long evaluation McWilliams received at the secure mental hospital before trial would be "considered above the ninetieth percentile in terms of completeness among forensic evaluations at that time." P.C.T. 1087–88. McWilliams "would have been seen by multidisciplines and observed in a variety of different settings that far surpasses anything" that he or Dr. Woods would be able to do. P.C.T. 1088.

The state post-conviction court denied McWilliams's petition. P.C.T. 1775–1828. The court found that "the credibility of Dr. Woods and the reliability of his findings are questionable." P.C.T. 1814. The court also concluded that, even if Dr. Woods's testimony were reliable, the "failure to present" this kind of evidence at trial did not "make a difference in the outcome." P.C.T. 1815. The state appellate court affirmed. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

D. The federal courts denied McWilliams's habeas petition.

McWilliams filed a federal habeas petition in which he raised approximately thirty claims. In one claim, he argued that "he was entitled to the assistance of a partisan psychiatrist." J.A. 75a.

The magistrate judge reasoned that McWilliams "received the assistance required by *Ake*" because the trial court ordered "[t]he psychological testing requested by McWilliams." J.A. 88a. The court explained that there "is no evidence that Dr. Goff was

unavailable to the petitioner for consultation or to call as a witness"; instead, "the record indicates that McWilliams never requested Dr. Goff's assistance" but "insisted that a different expert review Dr. Goff's findings." *Id.* Because Dr. Goff performed "the *specific* testing requested by counsel," the court was unpersuaded "that he could not understand these tests or their results." J.A. 89a n.19.

The Eleventh Circuit Court of Appeals affirmed, rejecting the *Ake* claim for three reasons. First, the court held that *Ake* did not clearly establish a right to a partisan expert. Although some "circuits have held that the [S]tate must provide a non-neutral mental health expert," the court noted that "the United States Supreme Court has thus far declined to resolve this disagreement among the circuits." J.A. 33a. Second, the court of appeals held that, on the facts of this case, the state courts' "determination that *Ake* was satisfied" was "not contrary to or an unreasonable application of clearly established Federal law." J.A. 35a. Third, "[e]ven assuming an *Ake* error occurred," it did not have a "'substantial and injurious effect or influence' on the outcome of McWilliams's case." J.A. 35a–36a. The pre-trial evaluation had "determined McWilliams was a malingerer and a faker," Dr. Goff's report "indicated that McWilliams was malingering on some level," and, "even Dr. Woods, McWilliams's post-conviction expert[,] admitted McWilliams has a history of malingering and can be deceitful and manipulative." J.A. 36a. The court of appeals concluded that "[a] few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome" the aggravating circumstances of the case. *Id.*

Judge Jordan concurred. He explained that "the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert." J.A. 49a. He also agreed that McWilliams could not show prejudice, in part because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." *Id.*

Judge Wilson dissented. He concluded that *Ake* requires, and that McWilliams was denied, "meaningful" expert assistance. J.A. 50a. In his view, the majority and concurrence's "focus on the 'neutral expert' issue misses the point." J.A. 59a n.4. Judge Wilson reasoned that Dr. Goff's assistance was not "meaningful," in part, because he "provided his report to the defense and prosecution at the same time." J.A. 58a. Judge Wilson also would have found prejudice because McWilliams's post-conviction psychiatrist suggested that his MMPI test results were not necessarily "someone attempting to make themselves look worse" but a "cry-for-help." J.A. 61a.

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed the denial of McWilliams's habeas petition. *Ake* did not clearly establish the right to a partisan psychiatrist. But even if it did, the state courts reasonably denied McWilliams's claim.

I. The right to a partisan psychiatrist was not "clearly established" when the state courts denied McWilliams's due process claim.

A. *Ake* did not hold that only a partisan psychiatrist's assistance can satisfy due process. Certain aspects of the opinion suggest that a defendant should be appointed a partisan psychiatrist when the prosecution hires a partisan psychiatrist of its own. But a neutral psychiatrist who reports to all parties can also satisfy due process.

First, *Ake* was directed at an altogether different question than the one presented in this case. The problem in *Ake* was not that the defendant had insufficiently partisan assistance. It was that he had no psychiatric assistance at all. The Court emphasized this fact in the opinion, explaining that there was no testimony about the defendant's sanity at the time of the crime because no psychiatrist had ever evaluated him for that purpose.

Second, important parts of the Court's opinion in *Ake* suggest that a neutral psychiatrist can satisfy due process. The Court distinguished previous cases by noting that "neutral psychiatrists" had examined the defendant. The Court also expressly limited the right to a psychiatrist's assistance in ways that are inconsistent with requiring a partisan psychiatrist. It explained that a defendant does not have the right

to the assistance of more than one psychiatrist, cannot choose the psychiatrist or otherwise hire his own, and that states have discretion in implementing the right.

Third, the Court in *Ake* expressly based its decision on due process, not equal protection or the right to counsel. Due process requires fairness between the State and the criminal defendant in any particular case. Although fairness might require a partisan expert for the defendant if the prosecution hires a partisan expert, fairness can also be satisfied by a neutral court-appointed psychiatrist who is equally available to both parties. Either way, the defendant will have the raw materials to craft a defense based on his mental health.

Fourth, a neutral psychiatrist can assist the defendant in evaluating, preparing, and presenting a mental health defense. To hold otherwise would anomalously require the appointment of a partisan psychiatrist even when a neutral psychiatrist provides the defendant with a favorable diagnosis and testimony. Moreover, there is no certain confidentiality advantage with a partisan psychiatrist. The scope of attorney–client privilege and psychiatrist–patient privilege are questions of state law. And this Court has held that, if a defendant puts his mental health at issue, the defendant cannot prevent the prosecution from introducing the results of a mental-health evaluation that the defendant requests.

Fifth, Justice Rehnquist's dissent in *Ake* only heightens the ambiguity of the decision on this issue. He exaggerated the decision's implications by using terms, such as "defense advocate," that the Court itself never used. And he suggested that the Court's

entire discussion of psychiatric assistance at capital sentencing was dicta.

B. The subsequent treatment of *Ake* by this Court and the lower courts underscores that it did not clearly establish the right to a partisan psychiatrist.

First, despite the opportunity to do so, the Court has not granted certiorari on whether *Ake* requires a partisan psychiatrist. Instead, the Court has consistently declined to revisit this issue or any other issue about *Ake*. The Court's refusal to revisit *Ake* suggests that the issue remains open.

Second, the lower courts were split at the time of the state court decision on review here. The split of authority is not limited to a single outlier circuit. Instead, the Eleventh Circuit, the Fifth Circuit, six judges in the Sixth Circuit, and at least eight state courts of last resort have held that *Ake* does not require a partisan psychiatrist. Even the lower courts on remand in *Ake* held that due process is satisfied by the assistance of a neutral psychiatrist. Such widespread disagreement about the meaning of *Ake* is near-conclusive evidence that it did not clearly establish McWilliams's proposed bright-line rule.

Third, some lower federal courts have held that *Ake* requires a partisan psychiatrist, but a close examination shows that they do not support the petitioner's claim in this case. Sometimes, those lower courts were bound to appoint an independent psychiatrist by the Criminal Justice Act, not *Ake*. Other lower courts relied on circuit precedent to resolve the ambiguity in *Ake*. Ultimately, the lower courts on this side of the split are best viewed as extensions of *Ake*, not applications of its holding.

C. This Court's precedents on the meaning of "clearly established" federal law support the court of appeals' decision to deny the habeas petition.

First, a federal court cannot grant habeas relief if it must extend the reasoning in one of this Court's cases to a new issue that the case did not directly address. This Court has reversed lower courts for committing this error in the past. Instead, the need to extend a precedent to reach the issue presented in a case is itself evidence that the law was not clearly established.

Second, a federal court must also focus on the specific question presented when evaluating whether there is clearly established law on point. The Court has reversed lower courts when they have stated the question presented in more general terms. *Ake* concerned the complete denial of any psychiatric assistance. It did not address whether the assistance of a neutral psychiatrist can satisfy due process.

Third, this habeas case is like the many cases where this Court has held that no clearly established law resolved the specific habeas claim. It is not comparable to the two cases McWilliams cites on this issue. In one of those cases, the respondent never even disputed whether the law was clearly established. In the other, the Court had addressed the issue in five previous cases.

II. No matter whether *Ake* clearly established the right to a partisan expert, the court of appeals was correct to deny the habeas petition.

A. Even if *Ake* clearly established the right to an "independent psychiatrist," the state court's decision was not contrary to or an unreasonable application of

that law. The state court concluded that McWilliams had been allowed to use psychiatrists as he wished. McWilliams had the assistance of a consulting psychologist at sentencing, and he used her assistance to order a battery of specific tests. Although defense counsel suggested that he needed a continuance to evaluate the tests he had ordered, the state courts reasonably denied a prolonged continuance.

B. The court of appeals was also correct that any due process error did not affect the outcome of the proceeding.

First, a second opinion on Dr. Goff's report would not have changed the result. This was a heavily aggravated case. The jury recommended death, and the trial court explicitly found that McWilliams's prior convictions for robbery and rape, as well as the brutal nature of the murder, outweighed any potential mitigating factor based on McWilliams's mental health. Dr. Goff's report is five pages long, has a list of conclusions at the end, and is easy to understand. Moreover, McWilliams's partisan expert, Dr. Woods, agreed with Dr. Goff's report and also testified that McWilliams was untruthful and manipulative.

Second, an additional review of McWilliams medical records would not have changed the result. Although McWilliams's post-conviction expert diagnosed him as bipolar, McWilliams's medical records reflect that he has been prescribed mostly antidepressants and has not been treated with the primary drugs for bipolar disorder. No expert diagnosed McWilliams with traumatic brain injury based on his records.

ARGUMENT

I. The right to a partisan psychiatrist was not clearly established at the time of the relevant state court decision.

The right that McWilliams says *Ake* established is broad and ill-defined. McWilliams argues that *Ake* clearly established the right to an expert who works "closely with the defense and independently of the prosecution." Pet. Br. 24. But, of course, all the psychiatrists who evaluated McWilliams and reported to the court at his request were "independent" of the prosecution in the conventional sense. None of them were selected or hired by the prosecution. They evaluated McWilliams, conducted specific tests, and prepared reports about his mental state because defense counsel wanted them to. They were no more answerable to the prosecution than a public defender or courtroom bailiff.

Instead of a psychiatrist who is "independent of the prosecution," McWilliams is really arguing for a psychiatrist who is *dependent on the defense*. That is, a partisan expert answerable to the defendant's lawyers and predisposed toward his position. Although the "precise contours" of *Ake* "remain unclear,"[4] it expressly disclaims recognizing a constitutional right for a defendant to "hire his own" psychiatrist, *Ake*,

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[4] *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014), *in turn quoting Lockyer v. Andrade*, 538 U.S. 63 (2003), *in turn quoting Harmelin v. Michigan*, 501 U.S. 957 (1991)) (internal quotation marks omitted).

470 U.S. at 83. Whatever *Ake* means, it does not clearly establish that due process is never satisfied by the assistance of a neutral psychiatrist.

A. *Ake* did not hold that due process can be satisfied only by the assistance of a partisan psychiatrist.

The Court did not hold in *Ake* that due process requires the provision of a partisan psychiatrist. This Court has explained that litigants should not characterize its holdings at "a high level of generality" but instead should focus on "the specific question presented by" a particular case. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014). The problem the Court confronted in *Ake* was not that the defendant had insufficiently partisan assistance; it was that he had no assistance at all. Accordingly, as the Fourth Circuit explained in a slightly different context, "the precise holding in *Ake* was simply that the failure to provide any [psychiatric] evaluation did not comport with the Due Process Clause." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998).

Because the holding of *Ake* says nothing about partisan versus neutral psychiatrists, McWilliams's argument proceeds by *implication* from snippets in the Court's opinion that *assume* the prosecution and defense will employ separate psychiatrists. But these snippets do not clearly establish the right to a partisan defense expert. At most, they suggest that, when the prosecution employs a partisan psychiatrist to meet its burden of proof on some issue, a defendant should be allowed to employ a partisan psychiatrist as well. That is not the holding of *Ake*, but even if it

were, it would not help McWilliams because the prosecution did not use a partisan psychiatrist to meet its burden of proof in this case.

1. The question of partisan versus neutral psychiatric assistance was not raised or decided in *Ake*. In *Ake*, a capital defendant raised insanity as a defense to murder. State law imposed the burden on him to establish that defense, but he did not have the "basic tools" to do so. He lacked those "basic tools" because, although he was evaluated by several psychiatrists for his competency to stand trial, he was never evaluated for his sanity at the time of the crime. *See Ake*, 470 U.S. at 72. The defendant's counsel "asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one." *Id.* The trial court denied the motion, and no one—not a neutral psychiatrist or a partisan psychiatrist—provided an evaluation that could have been used to establish the defendant's mental condition at the time of the crime. Instead, the prosecution relied on the psychiatrists' testimony to establish an aggravating factor at sentencing.

This Court granted certiorari on whether a State can "constitutionally refuse to provide any opportunity whatsoever" for an indigent defendant "to obtain [an] expert psychiatric examination." Cert. Pet. at i, *Ake v. Oklahoma*, 470 U.S. 68 (1985) (No. 83-5424). And the Court answered that question in the negative:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a

> State provide access to a psychiatrist's assistance on that issue if the defendant cannot afford one. Accordingly, we reverse.

Id. at 74. But the Court had no occasion to address whether that assistance could be provided by a neutral expert instead of a partisan one.

In fact, the Court twice emphasized, as the key consideration, that the defendant in *Ake* had no assistance of any kind. First, in recounting the facts of the case, the Court emphasized with italics the fact that, because the defendant had never been evaluated, "*there was no expert testimony for either side on Ake's sanity at the time of the offense.*" *Id.* at 72. This is the only time emphasis appears in the Court's opinion. *See id.* at 89–90 (Rehnquist, J., dissenting) (noting that "[t]he Court makes a point of th[is] fact"). Second, in explaining its holding, the Court reasoned that a lower court precedent did not support affirmance because that case did not "even suggest that the Constitution does not require any psychiatric examination or assistance whatsoever." *Id.* at 84.

With respect to capital sentencing, the Court suggested that psychiatric assistance was also appropriate "when the State presents psychiatric evidence of the defendant's future dangerousness" as an aggravating factor. *Id.* at 83. The Court explained that, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), it had affirmed the prosecution's use of psychiatric testimony to establish the aggravating factor of future dangerousness. In *Barefoot*, the State hired two partisan psychiatrists who, although they had not examined the defendant, testified that they were "'100% sure' that an individual with the characteristics of [the de-

fendant] would commit acts of violence in the future." *Id.* at 905 n.11. The Court in *Ake* noted that it would be unfair if testimony from "the prosecutor's psychiatrists" could not be countered by "responsive psychiatric testimony" from "the defendant's doctors" about "the State's proof of an aggravating factor." *Ake*, 470 U.S. at 84. But the Court did not address psychiatric assistance in capital sentencing generally or discuss a situation when no "prosecutor's psychiatrists" testify to establish an aggravating factor.

2. Although the Court did not address the question, important parts of *Ake* strongly suggest that the assistance of a neutral psychiatrist satisfies due process.

First, the Court in *Ake* used only one adjective apart from "competent" to describe the kind of psychiatrist who satisfies due process: "neutral." The Court used that adjective when it rejected the State's argument that "[t]here is presently no constitutional right to have a psychiatric examination." *Id.* at 85. The Court held that the State's argument was a misreading of *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953) and *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951). These cases, the Court explained, did not "absolve" the trial court "completely of the obligation to provide access to a psychiatrist." *Ake*, 470 U.S. at 84. Instead, those precedents approved of "neutral psychiatrists" who "were not beholden to the prosecution," even though the experts in those cases reported to the court. *Id.* at 85.

The Court also reasoned that *Smith* was "addressed to altogether different variables," such that it did "not limit[]" the Court from considering the question anew. *Id.* at 85. But the Court did not over-

rule *Smith*. *See* WAYNE R. LAFAVE, CRIMINAL LAW 450 n.124 (5th ed. 2010) ("[T]he Court's discussion of *Smith* . . . is itself most ambiguous"). It merely explained that, at most, *Smith* "supports the proposition that there is no constitutional right to more psychiatric assistance than the defendant in *Smith* had received." *Ake*, 470 U.S. at 85. That is, the Constitution requires no more than examination by and testimony from neutral psychiatric experts about the defendant's sanity at the time of trial and the commission of the crime. *Smith*, 344 U.S. at 568.

Second, the Court recognized important limitations on the right of "access to a psychiatrist's assistance" that are inconsistent with a partisan role. *Ake*, 470 U.S. at 74. For one, the Court limited the right to the assistance of "one competent psychiatrist." *Id.* at 79. This limitation prevents a defendant from hiring separate consulting and testifying experts. The Court also held that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83. That precludes a defendant from approaching multiple psychiatrists in a search for one who will provide a helpful diagnosis. And with these limitations, the Court left to "the State the decision on how to implement this right." *Id.*

By imposing these limitations, the Court rejected the federal Criminal Justice Act's standard for expert assistance. The Court cited the Criminal Justice Act, along with many state statutes, as reflecting a general consensus that "indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise." *Ake*, 470 U.S. at 79. But

the Court established a rule that is inconsistent with that Act. The Criminal Justice Act provides funding so that a defendant can "hire his own" expert. *Id.* at 83. *Ake* expressly does not. *Id.* The Criminal Justice Act allows a defendant to hire more than one expert—one for testifying and one for consulting. *Ake* is expressly limited to a single psychiatrist. The Criminal Justice Act establishes a uniform rule. But *Ake* expressly "leave[s] to the States the decision on how to implement this right." *Id.* By imposing these important limitations on the right it recognized, the Court established "a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

3. Moreover, the Court emphasized that the doctrinal basis of *Ake* was due process, not the right to counsel or equal protection. *See Ake*, 470 U.S. at 87 n.13. It is telling, then, that McWilliams relies on the Sixth Amendment and the Equal Protection Clause to support his reading of *Ake*, Pet. Br. 2, 32, even though the Court expressly declined to address those theories. The upshot is that McWilliams's understanding of *Ake* is colored by legal principles—the right to counsel and equality between rich and poor—that the Court in *Ake* itself had "no occasion to consider." *Ake*, 470 U.S. at 87 n.13. *See also Bearden v. Georgia*, 461 U.S. 660, 665 (1983) ("[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause.").

The Court's reliance on due process, to the exclusion of equal protection and the Sixth Amendment, is important for two reasons.

First, due process is a flexible rule about fairness, and its requirements vary from case to case. Although the Court in *Ake* recognized the "evolving practice" of each party employing a psychiatrist, it did not mandate that practice as a matter of constitutional law. The Court explained that "States rely on psychiatrists as examiners, consultants, and witnesses." *Ake*, 470 U.S. at 81–82. And, where that occurs, "psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. In such cases, a psychiatrist would "know the probative questions to ask of the opposing party's psychiatrists" and could "assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 80, 82. But the Court "neither approve[d] nor disapprove[d]" of this "widespread reliance on psychiatrists." *Id.* at 82.

Instead of requiring a battle of experts in every case, the Court's goal was fairness between the prosecution and defense in each particular case. *Id.* at 84. "'Due process' emphasizes fairness between the State and the individual dealing with the State." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). Providing a neutral, court-appointed psychiatrist is just as consistent with this fairness principle as allowing each party to hire a separate expert. "Fairness" cannot require the appointment of a partisan psychiatrist for a defendant if the prosecution does not have a partisan psychiatrist of its own.

Second, the Court's due process reasoning focused on the role of a psychiatric evaluation as a "raw material" or "basic tool" to support a defense, not as a helper for defense counsel. *Ake*, 470 U.S. at 77. The Court concluded that the assistance of a psychiatrist

is "crucial to the defendant's ability to marshal his defense" because, "[i]n this role, psychiatrists gather facts . . . that they will share with the judge or jury" and "they offer opinions." *Id.* at 80. The psychiatrist's primary function is to "translate a medical diagnosis into language that will assist the trier of fact," not to give advice to a defense attorney. *Id.*

4. The Court also directed that the psychiatrist be available to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. But neutral psychiatrists, no less than partisan psychiatrists, can perform these functions. In this case, for example, before trial, McWilliams's counsel ordered, and received, an evaluation from neutral psychiatrists addressed to potential mitigating circumstances. Then, also at his request after trial, McWilliams's counsel received the results from a battery of specific psychiatric tests to use at the judicial sentencing hearing. Nothing prevented McWilliams's counsel from talking to these psychiatrists about their diagnoses, about the meaning of other potential diagnoses, or about how best to present those diagnoses so they could be understood by the factfinder.

McWilliams and his amici argue that a neutral psychiatrist is inherently incapable of assisting in "evaluation, preparation and presentation of the defense." Pet. Br. 26–27; Am. Psych. Ass'n Br. 8–9, 11. But what they really mean is that a partisan psychiatrist would give the defense a helpful *advantage* over the prosecution. Under their proposal, a defendant has the right to a partisan psychiatrist, even if the prosecution is limited to a neutral psychiatrist for rebuttal. This outcome is inconsistent with *Ake*'s

fairness principle. *See Ross*, 417 U.S. at 610–11 (due process is "a shield to protect," not "a sword").

In any event, this argument also fails on its own terms.

First, McWilliams's proposed bright-line rule would anomalously require the appointment of a partisan psychiatrist, even when a neutral psychiatrist provides a favorable diagnosis. Neutral, court-appointed psychiatrists can provide valuable assistance to a criminal defendant. *See Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986) (members of lunacy commission "gave evidence highly favorable to Magwood's insanity defense"); *Fielding v. United States*, 251 F.2d 878, 879 (D.C. Cir. 1957) (defendant achieved judgment of acquittal "principally on the testimony of three Government psychiatrists"). But the logic of McWilliams's position is that the assistance of a neutral psychiatrist inherently fails to satisfy due process, no matter how helpful the neutral psychiatrist proves to be. If the Court in *Ake* had meant to adopt such a counterintuitive bright-line rule, it would have expressly said so.

Second, McWilliams's argument that partisanship is necessary to preserve confidentiality is based on a faulty premise. McWilliams and his amici believe that discussions between a partisan expert and a defense lawyer are confidential unless and until the defendant calls the expert to testify. But this Court has never held that the Constitution protects a lawyer's or defendant's communications with a partisan, consulting psychiatrist. *See Lange v. Young*, 869 F.2d 1008, 1012–14 (7th Cir. 1989) (holding that the prosecution could constitutionally call as a witness "a psychiatrist who was originally retained by defense

counsel"); *Noggle v. Marshall*, 706 F.2d 1408, 1415–17 (6th Cir. 1983) (allowing prosecution's "subpoena of a psychiatrist who has made an evaluation for the purpose of serving as a possible defense witness"). Instead, the scope of attorney–client privilege and psychiatrist–patient privilege, as applied to consulting experts in criminal proceedings, is a question of state law.

Because the scope of these privileges is a question of state law, there is no certain confidentiality advantage from the use of a partisan expert. At the time of *Ake*, courts in at least eight states had held that no privilege covered communications with a non-testifying defense psychiatrist,[5] and others have adopted or reaffirmed that result in the intervening years.[6] Moreover, if a defendant raises his mental status at trial, this Court has clearly held that a defendant has no Fifth or Sixth Amendment right to

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[5] *See State v. Bonds*, 653 P.2d 1024, 1036 (Wash. 1982) (en banc) (raising mental health waives privilege for a consulting psychiatrist); *In re Noggle*, No. 3-77-11, 1978 WL 215792 (Ohio App. Oct. 19, 1978) (same); *People v. Edney*, 350 N.E.2d 400 (N.Y. 1976) (same); *State v. Craney*, 347 N.W.2d 668, 676–77 (Iowa 1984) (finding no privilege for consulting psychiatrist); *State v. Dodis*, 314 N.W.2d 233, 240–41 (Minn. 1982) (same); *State v. Carter*, 641 S.W.2d 54, 58–59 (Mo. 1982) (en banc) (same); *Granviel v. State*, 552 S.W.2d 107, 117 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977) (same); *People v. Sorna*, 276 N.W.2d 892, 894–95 (Mich. 1979) (requiring defendant to produce all psychiatric evaluations as part of discovery).

[6] *See Trusky v. State*, 7 P.3d 5, 10 (Wyo. 2000); *State v. Hamlet*, 944 P.2d 1026, 1030 (Wash. 1997) (en banc); *Gray v. District Court of Eleventh Judicial District*, 884 P.2d 286 (Colo. 1994) (en banc); *State v. McDaniel*, 485 N.W.2d 630, 632–33 (Iowa 1992).

prevent the prosecution from introducing the results of a mental health evaluation requested by the defense. *See Kansas v. Cheever*, 134 S. Ct. 596 (2013); *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987). Otherwise, the defendant's refusal to cooperate with the prosecution could "deprive the State of the only effective means it has of controverting [the defendant's] proof on an issue that he interjected into the case." *Estelle v. Smith*, 451 U.S. 454, 465 (1981).

Third, McWilliams's position reads too much into *Ake*'s reference to an *ex parte* proceeding on whether to appoint a psychiatrist. The lower courts are split as to the import of this phrase in the *Ake* opinion. *See Moore v. State*, 889 A.2d 325, 340–42 (Md. 2005) (recounting split). Nonetheless, the point of an *ex parte* hearing on a defendant's motion for psychiatric assistance is that the defense does not have to disclose why it wants the psychiatric evaluation or its evidentiary basis for requesting the evaluation. *See id.* It has nothing to do with whether the evaluation itself must be confidential. Ultimately, "*Ake* does not address the issue of confidentiality" or "the State's access to the information generated during a psychiatrist's examination of a defendant." *Hamlet*, 944 P.2d at 1030.

5. Finally, then-Justice Rehnquist's dissent in *Ake* does not help clearly establish McWilliams's proposed rule. It reflects the common dissenting technique of portraying the majority rule as "far too broad," 470 U.S. at 87, and in more sweeping terms than the majority employed. As the Court has often observed, dissents have "been known to exaggerate" their interpretation of a majority opinion to highlight the consequences they dislike. *Chaidez v. United*

States, 133 S. Ct. 1103, 1110 n.11 (2013). Justice Rehnquist's dissent in *Ake* similarly "exaggerates the implications" of the decision. *See United States v. Albertini*, 472 U.S. 675, 684 (1985). Indeed, Justice Rehnquist portrayed the majority as requiring a "defense consultant" and "defense advocate," *Ake*, 470 U.S. at 87, 92, terms nowhere used by the majority itself.

If anything, Justice Rehnquist's dissent highlights the ambiguity in *Ake*. As Justice Jackson observed, when a dissenter "exaggerate[s] the holding of the Court," a "poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant." ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 18–19 (1955). And, just before criticizing the majority's reasoning, Justice Rehnquist argued that the Court's entire discussion of psychiatric assistance at sentencing "may be treated as dicta." *Ake*, 470 U.S. at 92. The dissent's reading of *Ake* hardly supports McWilliams's position. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., opinion of the Court) (clearly established law "refers to the holdings, as opposed to the dicta, of this Court's decisions").

* * *

Whether the right of "access to a psychiatrist's assistance" could be satisfied by a neutral psychiatrist at either the guilt or penalty phase was, quite simply, not before the Court in *Ake*. Although certain aspects of the opinion assume that the prosecution

and the defense will hire separate partisan experts, other parts of the opinion suggest that a neutral expert suffices. The holding of *Ake* is that a defendant has the right to access psychiatric assistance, not that the psychiatrist must report only to the defendant's counsel.

B. This Court's subsequent treatment of *Ake* and decisions from the lower courts underscore that the claimed right was not clearly established.

Because "[t]he *Ake* Court . . . never addressed what would constitute 'access' and whether provision of a neutral psychiatrist would be sufficient," the question remained "an open one subsequent to the *Ake* decision." *Miller v. Colson*, 694 F.3d 691, 697 (6th Cir. 2012). Commentators immediately recognized that the "ambiguous *Ake* language" could be read to require a "'neutral' psychiatric evaluation" or the "appointment of a partisan psychiatrist." Donald H. Dubia, *The Defense Right to Psychiatric Assistance in Light of* Ake v. Oklahoma, ARMY LAW., Oct. 1987, at 15, 20. Indeed, a leading treatise suggests that "*Ake* appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration." WAYNE R. LAFAVE, CRIMINAL LAW 449 (5th ed. 2010). For that reason, commentators predicted that the role of the psychiatrist would be "the next constitutional issue adjudicated" after *Ake*. Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1551 n.18 (1985).

But this Court never answered the open question. Instead, at the time of the state court decision on review here,[7] the lower courts were split. We agree with McWilliams that the Court should consider this history as evidence of what *Ake* "clearly established." Pet. Br. 37. But we disagree about which judicial decisions are relevant and what they show. Although the subjective opinion of a single judge does not control whether a rule is "clearly established," widespread disagreement among the lower courts is near-conclusive evidence on this point. This is especially true where, as here, the divergence "[r]eflect[s] the lack of guidance from this Court." *Carey v. Musladin*, 549 U.S. 70, 76 (2006). *See also Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*).

1. A few years after *Ake*, the Court had the opportunity to resolve whether due process required a partisan psychiatrist, but it chose not to. In *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), the Fifth Circuit upheld a Texas statute mandating that a court-appointed psychiatric expert provide a written report to the court and both parties. The Fifth Circuit reasoned that the defendant's "ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert" and held that the "Texas procedure complies with the mandate of the Constitution." *Id.* at 192.

The defendant petitioned for certiorari. The case squarely presented "whether an indigent criminal

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[7] The relevant state court decision here was the Alabama Court of Criminal Appeals' decision in 1991. *See Greene v. Fisher*, 565 U.S. 34, 45 (2011).

defendant's constitutional right to psychiatric assistance in preparing an insanity defense is satisfied by court appointment of a psychiatrist whose examination report is available to both the defense and prosecution." *See Granviel v. Texas*, 110 S. Ct. 2577 (1990) (Marshall, J., dissenting from denial of certiorari). But this Court declined to grant certiorari in *Granviel* over the dissent of *Ake*'s author, Justice Marshall. *Id.* The Court continued to deny certiorari on this and other issues relating to ambiguities in *Ake*, often over Justice Marshall's dissent. *See Vickers v. Arizona*, 497 U.S. 1033 (1990) (Marshall, J., dissenting from denial of certiorari) (diagnostic testing); *Johnson v. Oklahoma*, 484 U.S. 878 (1987) (Marshall, J., dissenting from denial of certiorari) (nonpsychiatric expert assistance); *Brown v. Dodd*, 484 U.S. 874 (1987) (Marshall, J., dissenting from denial of certiorari) (effectiveness of expert assistance).

In merits cases, the Court also discussed *Ake* in ways that failed to resolve the ambiguity. In *Tuggle v. Netherland*, 516 U.S. 10 (1995), the Court addressed how to evaluate whether *Ake* error is harmless. The Court's summary, per curiam opinion in *Tuggle* refers in passing to *Ake* as holding that "when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Id.* at 12. But the Court did not explain what it meant by "independent," and, in other cases, the Court omitted the word "independent" when it described *Ake*. *See Simmons v. South Carolina*, 512 U.S. 154, 165 (1994)

("[W]here the State presents psychiatric evidence of a defendant's future dangerousness at a capital sentencing proceeding, due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense."); *Medina v. California*, 505 U.S. 437, 444 (1992) ("[D]ue process requires that the defendant be provided access to the assistance of a psychiatrist.").

The Court's failure to resolve this issue underscores that it "is an open question in [the Court's] jurisprudence." *Musladin*, 549 U.S. at 76. And although this Court's decision to deny certiorari in *Granviel* does not reflect how the Court might ultimately resolve it on direct review, it is reasonable to infer from that denial and others like it that the issue remains an open question. *See Mottola v. Nixon*, 464 F.2d 178, 182–83 (9th Cir. 1972) ("[T]he consistently expressed views of Mr. Justice Douglas on the issues in question pointedly emphasize the equally consistent refusal of the majority of his Brothers to grant certiorari in those cases wherein the issues have been tendered."). McWilliams, on the other hand, proceeds as if this Court had granted certiorari in *Granviel* and reversed the Fifth Circuit. His position on clearly established law would be no different had Justice Marshall's dissent from the denial of certiorari in *Granviel* been the Court's opinion.

2. By the time of the state court decision here, a large number of lower courts had held that the assistance of a neutral psychiatrist could satisfy *Ake*. This was not, as McWilliams suggests, the opinion of a single outlier circuit. *See* Pet. Br. 36. Instead, it was the opinion of the Eleventh Circuit, the Fifth Circuit, and at least eight state courts of last resort. It was

even how the Oklahoma courts on remand in *Ake* understood the right that this Court had recognized.

The first federal appellate court to reject a request for a partisan expert after *Ake* was the Eleventh Circuit in *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986). There, as in this case, an Alabama trial court appointed a "lunacy commission" of psychiatrists to examine the defendant, which eventually grew to six neutral doctors. *Id.* at 1440, 1443. But the trial court denied the defendant's request for funds to "hire a consulting psychiatrist." *Id.* The court of appeals affirmed the resulting conviction. The court noted that defense counsel had secured favorable testimony by deposing the neutral psychiatrists who had examined the defendant. *Id.* at 1443. The court reasoned that, although a partisan consulting psychiatrist "might have been desirable, it was not required under the Constitution." *Id.* Instead, quoting *Ake*, the court held that the defendant "clearly was provided with 'access to a competent psychiatrist'" by way of the neutral psychiatrists who examined him.[8] *Id.*

Other federal judges reached the same conclusion. The Fifth Circuit agreed with the Eleventh Circuit in *Granviel*, holding that the "availability of a neutral expert provides defendants with 'the raw materials integral to the building of an effective defense.'" 881 F.2d at 192. Additionally, when the Sixth

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[8] Although the Eleventh Circuit later retreated from its reasoning in *Magwood*, it was an established precedent at the time of the state court decision here, and the state court expressly relied on it. *See* J.A. 106a (state court quoting *Magwood*).

Circuit addressed the issue en banc in 1990, six judges—one short of a majority—concluded that the appointment of a neutral psychiatrist satisfied *Ake*. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1117–18 (6th Cir. 1990) (en banc) (Kennedy, J., dissenting). These judges rejected the argument that, because a psychiatrist "was neutral," he "could not give effective defense assistance" as contemplated by *Ake*. *Id.* The majority decision avoided the *Ake* issue by reversing on another ground. *Id.* at 1110 (Merritt, C.J., opinion of the court).

In the immediate wake of *Ake*, state courts also held that the assistance of a neutral psychiatrist can satisfy due process. In *Djadi v. State*, 528 A.2d 502 (Md. 1987), the Maryland Court of Appeals, which is the state's highest appellate court, held that *Ake* did not recognize a "Constitutional right to seek independent psychiatric assistance," such that an evaluation at a state hospital "fully satisfied any Constitutional right appellant had to the assistance of psychiatric experts." *Id.* at 504. The supreme courts of Arkansas,[9] Hawaii,[10] Indiana,[11] Kentucky,[12] Missis-

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[9] *Beard v. State*, 816 S.W.2d 860, 863 (Ark. 1991) ("[W]e have held that where a defendant is evaluated by the State Hospital, as here, such an evaluation complies with the dictates of *Ake*.").

[10] *State v. Hoopii*, 710 P.2d 1193, 1196 (Haw. 1985) (approving trial court's denial of motion for expert funds under *Ake* because defendant had already been evaluated by three neutral physicians).

[11] *Palmer v. State*, 486 N.E.2d 477, 481–82 (Ind. 1985) (denying *Ake* claim because "Indiana's system of appointing at least two disinterested experts for trial provides a more reliable fact-finding basis than would a system in which both sides show up for trial with their own 'hired guns.'").

sippi,[13] North Dakota,[14] and Ohio[15] also rejected the claim that *Ake* created the right to a partisan expert. *See also United States v. Davis*, 22 M.J. 829, 833 (N-M. C.M.R. 1986) (holding, in a military court martial, that *Ake* requires the "availability of impartial psychiatric advice," not the appointment of "a psychiatrist especially for the [defendant]").

Even the lower courts on remand in *Ake* held that neutral experts could provide appropriate assistance. Before Ake was retried for murder, he was tested at a state facility by three doctors who determined that he was competent to stand trial and testified to that fact at the competency hearing. *See Ake v. State*, 778 P.2d 460 (Okla. Crim. App. 1989). The trial court denied Ake's "written request for the appointment of a psychiatrist to aid him in preparing for the hearing."

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[12] *Kordenbrock v. Com.*, 700 S.W.2d 384, 387 (Ky. 1985) (finding no *Ake* error when defendant "was offered a psychiatric test at a state facility" but refused "[u]pon being advised this facility would provide only an objective evaluation").

[13] *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991) (holding that the defendant "had no right to funds for an expert because his examination at the state hospital met the constitutional mandates of *Ake*").

[14] *State v. Indvik*, 382 N.W.2d 623, 625–26 (N.D. 1986) (rejecting defendant's request for "independent psychological evaluations," and "conclud[ing] that the State Hospital staff conducted a sufficient examination to satisfy the requirements of *Ake*").

[15] *State v. Hix*, 527 N.E.2d 784, 787 (Ohio 1988) (affirming conviction despite request for partisan psychiatrist because "the trial court, pursuant to R.C. 2945.39 and the holding in *Ake*, *supra*, ordered a psychiatric evaluation of appellee, with results of the examination being given to both the prosecution and counsel for appellee").

Id. at 464. On appeal, the Oklahoma Court of Criminal Appeals affirmed. The court reasoned that "due process does not entitle [a defendant] to a state-funded psychiatric expert *to support his claim*; rather, due process requires that he have access to a competent and impartial psychiatrist." *Id.* at 465 (emphasis added). The court held that the "appellant's due process rights were not violated" because he was "examined by three competent psychiatrists." *Id.*

The lower courts' rejection of McWilliams's proposed rule is near-conclusive evidence that *Ake* did not "clearly establish" the right to a partisan expert. The courts of appeals have held that widespread division in the lower courts demonstrates that a rule is not clearly established.[16] This Court has likewise found that a legal rule is not clearly established when the lower courts recognize that the question is "unresolved," *White v. Woodall*, 134 S. Ct. 1697, 1703 n.3 (2014), or when "the lack of guidance from this Court" has led lower courts to "diverge[] widely in their treatment" of a question, *Musladin*, 549 U.S. at 76. Lower court decisions can provide guidance about whether "Supreme Court precedents ha[ve] clearly established a rule as of a particular time." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3, at 1890–91

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[16] *See, e.g., Grim v. Fisher*, 816 F.3d 296, 309 (5th Cir. 2016); *Lemke v. Ryan*, 719 F.3d 1093, 1103–04 (9th Cir. 2013); *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011); *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 104–05 (3d Cir. 2012); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006); *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006).

(7th ed. 2016). And "their diverging approaches to the question illustrate the possibility of fairminded disagreement." *White*, 134 S. Ct. at 1703 n.3. The lower courts' diverging views on how to interpret ambiguities in *Ake* underscore that *Ake* did not clearly establish the rule that McWilliams supports.

3. Although some courts have resolved the ambiguity in *Ake* in favor of a partisan expert, *see* Pet. Br. 35, those cases do not help McWilliams's habeas claim.

First, McWilliams conflates rulings based in part on the Criminal Justice Act with rulings based entirely on *Ake*. The Tenth Circuit quickly addressed *Ake* after it was issued, but it did so in cases that were actually controlled by the "the mandatory language of 18 U.S.C. § 3006A(e)(1)." *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985). *See also United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986) (holding that "the district court erred in refusing to appoint [the defendant] a psychiatrist to help in his defense pursuant to 18 U.S.C. § 3006A(e)(1)"). Similarly, in *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989), the Seventh Circuit carefully rooted the right to an "independent" psychiatrist on the interplay of *Ake* and the Criminal Justice Act. Describing *Ake*, the court explained that the "due process clause guarantees indigent defendants the aid of government-paid psychiatric assistance." *Id.* at 637. The Criminal Justice Act, on the other hand, "permits an indigent defendant to request the aid of government-supported *independent* experts." *Id.* (emphasis added).

Second, even in adopting McWilliams's proposed rule, the lower courts continued to be confused. The

Eleventh Circuit suggested that a neutral expert was insufficient in *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), without mentioning its decision in *Magwood*. And a panel in the Sixth Circuit held that a partisan expert was required, *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003), only to have a different panel disagree and declare the earlier panel's statement to be dicta, *Smith v. Mitchell*, 348 F.3d 177, 208 n.10 (6th Cir. 2003), only to have a final panel "extend[] *Ake* to require an 'independent' psychiatrist rather than a neutral, court-appointed psychiatrist," *Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006). These decisions show confusion, not that the law was clearly established.

Third, a close examination reveals that the lower court decisions on McWilliams's side of the "split" are *extensions* of *Ake*'s reasoning, not applications of its holding. Sometimes, courts expressly recognized that they were extending *Ake*. *See id.* In other cases, courts viewed their decisions as being "controlled" by *Ake*, although they resolved *Ake*'s ambiguity with the benefit of circuit court precedent. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) ("Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts"). The Ninth Circuit's decision in *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), is a good example. Although the court stated that its decision was controlled by *Ake*, its conclusions about the importance of confidentiality actually turned on the Third Circuit's view of the attorney–client privilege in *United States v. Alvarez*, 519 F.2d 1036, 1045–47 (3d Cir. 1975). *See Smith*, 914 F.2d at 1159–60. *Alva-*

rez, not *Ake*, provided the key piece of reasoning that led the Ninth Circuit to conclude that due process requires the assistance of a partisan psychiatrist. *See id.* (citing *Alvarez*). *See also Morris v. State*, 956 So. 2d 431, 448–49 (Ala. Crim. App. 2005) (relying on *Cowley* and *McCormick* to require independent psychiatrist).

These unresolved ambiguities in *Ake* and the history of widespread conflict between and within the lower courts undermine the argument that *Ake* "clearly established" the right to partisan psychiatric assistance. *See Miller*, 694 F.3d at 697.

C. This Court's AEDPA precedents show that *Ake* did not clearly establish the right to a partisan psychiatrist.

In light of the narrow question presented in *Ake* and the lower courts' treatment of that decision, this Court's precedents under the Anti-terrorism and Effective Death Penalty Act (AEDPA) support the court of appeals' decision to deny the habeas petition here. In fact, this case is similar to cases in which the Court has reversed lower courts for granting habeas relief.

1. McWilliams's first error is to ask this Court to extend the rule of *Ake* to a situation and issue that *Ake* did not directly address. "[C]learly established" law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412 (O'Connor, J., opinion of the Court). When no precedent "squarely addresses the issue," *Wright v. Van*

Patten, 552 U.S. 120, 125 (2008), a state court cannot have misapplied clearly established law.

In this respect, McWilliams commits the same error that the Fourth Circuit committed in *White v. Woodall*, 134 S. Ct. 1697 (2014). In *White*, this Court addressed whether the Fifth Amendment required an instruction at the sentencing phase of trial that no adverse inference about lack of remorse could be drawn from a defendant's silence. The Court had previously held that "a no-adverse-inference instruction is required at the *guilt* phase" and "disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing" about the facts of the crime. *Id.* at 1702–03. The Court had also "held that the privilege against self-incrimination applies to the penalty phase." *Id.* at 1703. But, in *White*, the Court nonetheless held that no clearly established law created a right to a no-adverse-inference instruction at the penalty phase. *Id.* It was error for the Fourth Circuit to extend these precedents to their "logical next step" on habeas review. *Id.* at 1707. *See also Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (holding that a trial court's restriction of defense counsel's summation to one defense theory was not the same as the complete denial of summation); *Knowles v. Mirzayance*, 556 U.S. 111, 121–22 (2009) (rejecting the Ninth Circuit's "nothing to lose" standard for effective assistance of counsel).

Similarly, in *Carey v. Musladin*, 549 U.S. 70 (2006), this Court held that the law did not clearly establish a due process violation based on the behavior of courtroom spectators, who wore buttons with the victim's face during the trial. Although this Court had found violations for similar conduct that

was "state-sponsored," the Court had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial," and had "never applied" the test for a violation to spectators' conduct. *Id.* at 76–77. Noting that lower courts had split over the application of the Court's earlier precedent to the situation presented in *Musladin*, the Court held that the state court decision was not contrary to clearly established law.

Like the prisoners in *White* and *Musladin*, McWilliams waves aside various ambiguities and limitations in the *Ake* decision and seeks to extend that precedent to its "logical next step." *White*, 134 S. Ct. at 1707. But as this Court has instructed, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the law was not 'clearly established at the time of the state-court decision.'" *Id.* at 1706.

2. McWilliams also errs by failing to focus on "the specific question presented by" *Ake* and by this case. As explained above, *supra* 22–25, *Ake* addressed whether due process required the State to provide at least some psychiatric assistance to a defendant who had legitimately put his mental state at issue. It did not address, and had no occasion to address, whether due process always requires the assistance of a partisan psychiatrist.

McWilliams thus commits the same error that the Ninth Circuit committed in *Lopez v. Smith*, 135 S. Ct. 1 (2014). *Lopez* involved the Ninth Circuit's application of the general rule that "a defendant must have adequate notice of the charges against him." *Id.* at 4. But the specific question in that case was

whether a capital murder defendant, who had received notice that he faced capital murder charges, must be specifically notified that he could be convicted as either a principal or an aider-and-abettor. *Id.* at 3–4. Rebuking the Ninth Circuit, this Court explained: "None of our decisions that the Ninth Circuit cited addresses, even remotely, the specific question presented by this case." *Id.* at 4. *See also Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (criticizing the Sixth Circuit's reading of *United States v. Cronic*, 466 U.S. 648 (1984), to create a broad right to counsel during the testimony of a government witness, because no case had addressed how the rule in *Cronic* applies to testimony about a *codefendant*); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (holding that *Michigan v. Lucas*, 500 U.S. 145 (1991), did not create a broad right to submit evidence related to a witness's credibility because "[n]o decision of this Court clearly establishes that this notice requirement [before introducing evidence of a witness's prior false allegations in sexual assault cases] is unconstitutional").

Ake's holding that a defendant has the right to psychiatric assistance is "far too abstract to establish clearly [McWilliams's] specific rule" about *partisan* psychiatric assistance. *Lopez*, 135 S. Ct. at 4. For that reason, as in *Lopez*, McWilliams improperly attempts to rely on circuit precedent to "refine or sharpen" *Ake* "into a specific legal rule that this Court has not announced." *Id.* (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013)).

3. McWilliams erroneously argues that this case is comparable to *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Abdul-Kabir v. Quarterman*, 550 U.S.

233 (2007). But his position finds no support in those decisions.

In *Wiggins*, the Court addressed whether a defense attorney's "failure to investigate his [client's] background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel." 539 U.S. at 514. The respondent agreed that *Strickland v. Washington*, 466 U.S. 668 (1984), required defense counsel to perform a reasonable investigation. *See* Resp't Br., *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311), 2003 WL 543903. In *Wiggins*, this Court simply applied that clearly established legal standard to the particular investigation in Wiggins's case. But, unlike the petitioner in *Wiggins*, McWilliams is not asking this court to apply a general standard to the specific facts of his case. Rather, he is arguing that *Ake* established a bright-line rule requiring an "independent" expert in every case.

Abdul-Kabir is even farther afield. That case concerned jury instructions about the consideration of mitigating circumstances in capital sentencing. Before the state court decision at issue there, this Court "had considered similar challenges to the *same* instructions no fewer than five times." 550 U.S. at 265 (Roberts, C.J., dissenting). In one case, *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court found the jury instructions to be unconstitutional. In *Abdul-Kabir*, the Court applied *Penry* to the same jury instructions again with the same result. Although McWilliams argues that the Court in *Abdul-Kabir* found clearly established law "based on language far less clear" than *Ake*'s, Pet. Br. 32, McWilliams ig-

nores the fact that the Court had addressed the same Texas jury instruction five times and held them unconstitutional before. Here, the Court declined to address the precise issue in this case over Justice Marshall's dissent, has never held the provision of a neutral expert unconstitutional, and has not revisited *Ake* for thirty years. *See Granviel*, 110 S. Ct. 2577.

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More than three decades after McWilliams brutally raped and murdered Patricia Reynolds, and nearly twenty-five years after his conviction became final, McWilliams seeks to take advantage of intervening legal developments to undermine "the State's significant interest in repose for concluded litigation." *See Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). That is exactly the kind of result that AEDPA was intended to prevent. *Id.* Instead, the law demands that, when the "precise contours" of a right "remain unclear," "state courts enjoy broad discretion" in adjudicating constitutional claims. *Woods*, 135 S. Ct. at 1377 (citations and quotations omitted). The state appellate court was well within its discretion when it denied McWilliams's due process claim in 1991.

II. No matter how the Court resolves the question presented, the court of appeals correctly denied the habeas petition.

Even if due process requires the provision of a partisan psychiatrist, the lower courts were right to deny McWilliams's habeas petition. The Court granted certiorari on whether *Ake* "clearly established" the right to the assistance of an independent psychiatrist. That is a "threshold" habeas issue that must be resolved before a court can evaluate whether to apply AEDPA's bar against re-litigation. *See Lockyer*, 538 U.S. at 71; *Williams*, 529 U.S. at 390. But no matter how the Court resolves that question, AEDPA's re-litigation bar still applies because the state court's decision was not "contrary to" or an "unreasonable application" of federal law. *See* 28 U.S.C. § 2254(d). Because McWilliams received the psychiatric assistance he asked for, he is not entitled to relief even under his proposed rule. And because the assistance he now seeks would not have made a difference, he cannot show that he was prejudiced.

A. The state courts properly denied McWilliams's *Ake* claim.

Even if *Ake* created a right to "independent psychiatric assistance," the state court's decision denying McWilliams's *Ake* claim was neither "contrary to" nor an "unreasonable application" of that principle. *See Williams*, 529 U.S. at 405 (O'Connor, J., opinion of the Court). McWilliams had a consulting expert that did not report to the State, and he never asked

for more expert assistance, even though the trial court gave him the opportunity to do so.

McWilliams's counsel had a consulting psychologist and actually made use of her assistance.[17] After McWilliams alleged ineffective assistance of counsel in his state post-conviction petition, his lawyers testified about their investigation into mitigating circumstances. They explained that they consulted with a psychologist employed at the University of Alabama about the "interpretation and understanding of existing records." P.C.T. 252. She believed that there was "nothing" in the lunacy commission's records that "was going to be useful in mitigation." P.C.T. 252. The consulting psychologist suggested that trial counsel request a "neuropsychological review" for potential "organic brain damage." P.C.T. 252. For that reason, trial counsel moved the court to order the State to conduct specific tests on McWilliams—the "EEG, Luria and Bender-Gestalt, *with the results made available to the court.*" T. 1615 (emphasis added). The trial court granted counsel's request, giving McWilliams exactly what he asked for.

The state appellate court denied this claim, not because of any ruling about independent psychiatrists, but because McWilliams had received the psychiatric assistance that he had requested. Under

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[17] In light of this fact, the Court might also choose to dismiss the writ as improvidently granted. *See Boyer v. Louisiana*, 133 S. Ct. 1702, 1704 (2013) (Alito, J., concurring); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183–84 (1959).

McWilliams's proposed rule, a defendant has "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate." Pet. Br. at 33 (quoting *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991)). The trial court here granted every relevant defense motion, except the motion to continue the sentencing hearing to seek another round of expert assistance. But the trial court also indicated that it would have considered a motion to appoint another expert to help counsel at the judicial sentencing hearing, if McWilliams had asked for one. T. 1429.

Nor did the state courts unreasonably apply *Ake* in denying McWilliams's motion for a continuance. *Ake* was not about the standards for granting a continuance at all. And the lower courts correctly rejected McWilliams's argument that "defense counsel did not have the time or expertise to achieve 'the basic level of understanding of'" Dr. Goff's report. *See* Pet. Br. 42 (quoting J.A. 56a). Dr. Goff's report is five pages long and plainly states its "conclusions" at the end. T. 1632–36. Moreover, because Dr. Goff performed "the specific testing requested by counsel," the district court was rightly unpersuaded that defense counsel "could not understand these tests or their results." J.A. 89a n.19. No matter the meaning of *Ake*, the state appellate court did not violate "clearly established" law in affirming McWilliams's sentence.

B. McWilliams was not prejudiced.

The court of appeals was also correct to conclude that any due process error, if it existed, did not have

a "substantial and injurious effect or influence in determining" the outcome of the proceeding. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *See also Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015); *Fry v. Pliler*, 551 U.S. 112, 119 (2007). The state courts twice found that the result of the judicial sentencing hearing would have been the same even if McWilliams had additional expert assistance. *See* J.A. 112a; P.C.T. 1814–15. Neither a second opinion on Dr. Goff's report nor an expert review of McWilliams's prison records would have changed the result in this case.

1. First, more time with Dr. Goff's report would have not altered the balance in this heavily aggravated case. By the time McWilliams requested another round of expert assistance, the jury had already voted to impose the death penalty. McWilliams had committed murder in the course of a rape and robbery, and he had done so in an especially brutal way—shooting his victim so many times that she bled to death. He had also committed a similar rape and robbery before. Four mental health experts, including Dr. Goff, had filed reports with the court finding that McWilliams was not suffering from psychological problems. In sentencing McWilliams to death, the trial court found that, even if McWilliams's mental health status "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." J.A. 188a.

McWilliams's contention that the trial judge misunderstood Dr. Goff's report is itself hard to understand. *See* Pet. Br. 44. Like the psychiatrists who had previously examined McWilliams for over a

month, Dr. Goff concluded that McWilliams "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems" and that "it is quite obvious . . . that his symptoms of psychiatric disturbance are quite exaggerated and, perhaps, feigned." T. 1635. One of Dr. Goff's "conclusions" at the end of the report is that "[t]he patient is attempting to exaggerate his psychiatric problems." T. 1636. In the sentencing order, the trial court "reviewed" Dr. Goff's report about "neurological and neuropsychological testing." J.A. 188a. The court found "that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment," but that he was also "feigning, faking, and manipulative." J.A. 188a. These are almost verbatim quotes from Dr. Goff's report.

The result would not have changed even if a partisan expert had interpreted Dr. Goff's report. McWilliams erroneously suggests that "[i]ndependent expert assistance would have enabled counsel to educate the judge about McWilliams's brain damage and counter the suggestion that McWilliams was 'feigning' and 'faking' mental illness." Pet. Br. 43. But the post-conviction proceedings further underscored that McWilliams is a malingerer. As Judge Jordan noted in his concurrence, Dr. Goff did not testify at that post-conviction hearing—undermining McWilliams's claim that a "proper understanding," Pet. Br. 44, of his report would support mitigation.[18] Instead, McWilliams hired Dr.

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[18] Dr. Goff routinely testifies for criminal defendants in capital cases. *See, e.g., Madison v. Comm'r, Ala. Dep't of Corr.*, No. 16-

Woods to testify on his behalf, and Dr. Woods testified that McWilliams was untruthful, "deceptive," and "manipulative." P.C.T. 1002, 1004. Ultimately, Dr. Woods testified that "Dr. Goff accurately" distinguished between "feigned" and "real" impairments, and Dr. Goff "made that clear in his report." P.C.T. 958.

2. McWilliams also cannot establish that a partisan review of his belatedly received prison records would have changed the result. *See* J.A. 191a–94a (suggesting a need to review prison records). Dr. Goff's report specifically evaluated "[d]iagnoses which appear on the patient's record." T. 1635.[19] McWilliams's partisan psychiatrist, Dr. Woods, diagnosed McWilliams as bipolar after consulting him and reviewing these records. P.C.T. 914, 986. But Dr. Woods agreed that McWilliams's prison records suggested that he had anti-social traits, P.C.T. 1024–25, that his records reflect that no other doctor has ever diagnosed McWilliams as bipolar, P.C.T. 1014–16, and that McWilliams's supposed bipolar disorder did not cause him to commit the crime, P.C.T. 1022. Although McWilliams finds it important that his records reflect that he was prescribed anti-psychotic

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12279, 2017 WL 992447, at *1 (11th Cir. Mar. 15, 2017); *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1312 (11th Cir. 2013); *Callahan v. Campbell*, 427 F.3d 897, 920 (11th Cir. 2005); *Hall v. Thomas*, 977 F.Supp.2d 1129, 1201 (S.D. Ala. 2013).

[19] There is no reason to believe, as Judge Wilson erroneously did in dissent below, J.A. 56a–57a, that Dr. Goff did not have his patient's medical records simply because the Department was late in filing them with the court.

medications in prison, Pet. Br. 38, Dr. Woods testified that McWilliams has "most consistently" been treated with antidepressants. P.C.T. 961. And Dr. Kirkland testified, without contradiction by Dr. Woods, that McWilliams's records reflect that he has "never [been] treated with a primary drug for bipolar disorder." P.C.T. 1089.

Moreover, none of the experts who evaluated McWilliams found that he suffers from traumatic brain injury. McWilliams's partisan expert, Dr. Woods, diagnosed him with a personality disorder, not a brain injury. P.C.T. 986, 1020. Dr. Woods certainly never suggested, as McWilliams's brief does, Pet. Br. 39–44, that McWilliams suffered a traumatic brain injury that affected his performance on certain tests.

* * *

It simply does not matter whether *Ake* established the right to partisan assistance. The state trial court granted McWilliams's two motions for psychiatric assistance and volunteered to appoint yet another expert if he had requested it. But another round of expert assistance would not have changed the fundamentals of McWilliams's case. The court of appeals was right that, even if there were *Ake* error, it did not prejudice McWilliams.

CONCLUSION

The Court should affirm the court of appeals.

Respectfully submitted,

STEVEN T. MARSHALL
Alabama Attorney General

Andrew L. Brasher*
Solicitor General
*Counsel of Record

Henry M. Johnson
Megan A. Kirkpatrick
Assistant Attorneys General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

March 29, 2017

RECORD AND BRIEFS

No. 16-5294

Supreme Court, U.S.
FILED
APR 17 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

JOSHUA S. MELTZER
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

STEPHEN B. BRIGHT
Counsel of Record
MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

272410

COUNSEL PRESS

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The State has no cogent response to McWilliams's showing that *Ake v. Oklahoma* clearly established a criminal defendant's right in appropriate cases to an independent expert to "assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985). This Court's opinion speaks in clear terms about the role this expert must play "to assure a proper functioning of the adversary process." *Id.* at 77. The expert is responsible for:

- providing "assistance" that "may well be crucial to the defendant's ability to *marshal his defense*," *id.* at 80 (emphasis added);

- advising the defense team on whether a particular "defense is viable," *id.* at 82;

- "assist[ing] in preparing the cross-examination of a State's psychiatric witnesses" by advising on "the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," *id.* at 80; and

- "translat[ing] a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand," *id.* at 80; *see also id.* at 81 (describing the role of testifying experts "*for each party* [to] enable the jury to make its most accurate determination of the truth on the issue before them" (emphasis added)).

None of these responsibilities could be discharged effectively by an expert providing "neutral" opinions directly to the tribunal as experts do in European-style

inquisitorial proceedings. The State does not even attempt to argue otherwise, and that failure is dispositive on the question presented. *Ake* was pellucid that defendants must be given the assistance needed "to present their claims fairly *within the adversary system.*" *Id.* at 77 (citation and quotation marks omitted) (emphasis added). The State's alternative reading of *Ake* would deny indigent criminal defendants that assistance. It cannot have been what the Court in *Ake* meant.

What it lacks in substance, the State seeks to make up in rhetoric. On page after page of its brief, the State repeats the mantra that McWilliams is reading *Ake* to require the assistance of a "partisan expert," who is "predisposed toward [the defendant's] position." *E.g.*, State's Br. at 21.[1] Of course, what the State derisively labels "partisan" is exactly the kind of expert assistance routinely obtained by the State itself (and other prosecutors) as well as criminal defendants and civil litigants who can afford to pay for it. Prosecutors and other litigants of means can and do seek out experts who will testify *for their side* in litigation. They routinely screen potential experts to find those whose opinions will best advance *their cause.*[2] They often hire separate consulting

1. Various courts and authors use words such as "neutral," "non-neutral," "independent," and "partisan," in different ways. Regardless of the label that is attached to the expert, it is the role of the expert that is dispositive. Because the State characterizes McWilliams's argument as a request for a "partisan" expert who necessarily takes a position favorable to the defense, many of its arguments are inapposite.

2. *See, e.g.*, Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1495-1506 (2007) (describing prosecutors consulting with

and testifying experts—sometimes multiple experts in each category. The "partisan expert" is the norm in our adversarial system.

McWilliams does not argue that *Ake* requires parity for him or other indigent criminal defendants. Those defendants are entitled to only "one competent expert" to assist them, not multiple consulting and testifying experts that prosecutors and other litigants routinely use. They do not get to choose the expert they would prefer but must accept the expert appointed by the trial court. They therefore face a risk that their expert will ultimately be unwilling or unable to offer testimony that will advance their cause. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 768-69 (2017). Unlike the prosecution, indigent criminal defendants are entitled only to an "adequate opportunity to present their claims fairly within the adversary system." *Ake*, 470 U.S. at 77 (citation and quotation marks omitted). But *Ake* was clear that this minimum level of assistance requires an independent expert who assists the defense. As the Alabama Court of Criminal Appeals

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a series of experts until finally finding ones who would reach the conclusions they wanted). Often the leanings of professional experts are apparent. For example, Texas prosecutors have regularly retained mental health experts who were well known for their willingness to predict a defendant's future dangerousness based on a hypothetical question. *See Barefoot v. Estelle*, 463 U.S. 880, 884, 902 (1983) (describing testimony of Dr. James Grigson and Dr. John Holbrook); *Flores v. Johnson*, 210 F.3d 456, 462 & n.6 (5th Cir. 2000) (Garza, J., concurring) (describing a doctor who was "frequently the state's star witness" and had found future dangerousness in 22 cases, but had not found a lack of dangerousness in a single case); Ron Rosenbaum, *Travels with Dr. Death*, Vanity Fair, May 1990, at 141 (describing Dr. Grigson testifying to future dangerousness in three cases in two days).

put it, *Ake* "made it clear" that an indigent defendant "is entitled to an independent expert—an expert devoted to assisting his defense and one who is not providing the same information or advice to the court and to the prosecution." *Morris v. State*, 956 So. 2d 431, 447-48 (Ala. Crim. App. 2005). McWilliams did not receive that assistance.

I. *Ake* Clearly Established that Due Process Requires a Mental Health Expert Responsible for Assisting in the Defense.

The primary source for determining what *Ake* clearly established is *Ake* itself, not a handful of lower court opinions and a law review note. This Court has defined "clearly established law" as the "governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The governing legal principle in *Ake* is that the adversarial process necessitates an independent expert who can assist the defense. The Court's opinion leaves no room for doubt on that score. *See* Pet'r's Br. at 21-31.

The State argues that *Ake* cannot have established such a principle because in *Ake* the defendant had not received expert assistance, independent or otherwise, at trial. State's Br. at 16, 23-24. That is incorrect. As an initial matter, the facts of *Ake* and of this case are in many respects congruent. Both Ake and McWilliams were evaluated at a state mental hospital by neutral doctors. Although the State focuses on the fact that the doctors did not evaluate Ake's sanity, and thus there were no experts on that issue, State's Br. at 16, 23-24, the prosecution in *Ake*, as in McWilliams's case, relied on the testimony of

those neutral doctors at the penalty phase. *Ake*, 470 U.S. at 71-73. The constitutional problem in *Ake* was not the absence of any expert testimony during the trial. The problem was that Ake, like McWilliams, did not receive a mental health expert *to assist the defense. See* Pet'r's Br. at 21-27; *see also Ake*, 470 U.S. at 84 ("due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase"); *id.* ("Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view . . . .").

Even more to the point, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring). To the contrary, this Court has repeatedly afforded relief under Section 2254 to defendants who have relied on governing principles that were clearly established in cases in which this Court had not even found a violation of the defendant's rights. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (holding that *Strickland v. Washington*, 466 U.S. 668 (1984), clearly established the principles for ineffective assistance of counsel claims even though the Court found in *Strickland* that the petitioner's counsel were not ineffective); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (same). The State's argument that the specific factual scenario and relief provided in *Ake* foreclose McWilliams's claim is irreconcilable with those precedents.

Only an independent expert assisting the defense can perform the necessary functions identified by the Court in *Ake*. The linchpin of the State's argument is that a

neutral expert is sufficient because the psychiatrist's function under *Ake* is "not to give advice to a defense attorney." State's Br. at 29. But the plain language of *Ake* contradicts that assertion. When an expert discusses with counsel whether a particular "defense is viable," the expert provides advice. *See Ake*, 470 U.S. at 82. Similarly, when an expert tells counsel what questions to ask of the prosecution's experts and how to interpret their responses, the expert provides advice. *See id.* at 80-82 ("know[ing] the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers," the expert can "assist in preparing the cross-examination of a State's psychiatric witnesses"); *id.* at 84 ("due process requires . . . assistance in preparation at the sentencing phase").[3] None of the neutral experts involved in this case fulfilled those roles, nor could they.[4]

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3. As noted in Petitioner's Brief, it is impossible for an expert shared by the prosecution and the defense to assist defense counsel in preparing to cross-examine himself. *See* Pet'r's Br. at 25.

4. The State asserts that at the time of *Ake*, several state courts had held that communications with non-testifying defense experts were not privileged. State's Br. at 31 & n.5-6. However, many of the cases cited by the State do not support that assertion. Instead, they stand for the uncontroversial proposition that the privilege *can be waived*. *See, e.g.*, *Gray v. Dist. Court of Eleventh Judicial Dist.*, 884 P.2d 286, 293 (Colo. 1994) ("where a defendant tenders a plea of not guilty by reason of insanity or asserts the affirmative defense of impaired mental condition, the defendant waives his right to claim the attorney-client and physician/psychologist-patient privileges"); *State v. Bonds*, 653 P.2d 1024, 1034 (Wash. 1982) (although communications between defendant and his psychiatrist were within the attorney-client privilege, defendant waived the privilege by calling the psychiatrist as a defense witness at a hearing). The cases simply highlight that a defendant and counsel may make a decision about when to waive privilege given the applicable state law; they in no

Recognizing, as it must, that "[c]ertain aspects" of *Ake* dictate that a defendant should receive the kind of independent expert assistance that McWilliams seeks here, the State falls back to the argument that such assistance is required only when the State has put on its own partisan expert. State's Br. at 16-17, 22-23. The State does not identify a single judicial decision or academic article advancing this interpretation, and it is plainly wrong. *Ake* itself is clear about the requisite threshold showing: it turns on the defendant's mental state being at issue at the guilt phase or at sentencing. *Ake*, 470 U.S. at 83-84. It does not turn on whether the prosecution retains an expert or what the prosecution ultimately presents in court.

Allowing the prosecution to dictate whether an indigent defendant is entitled to expert assistance regarding his mental health would undermine the adversarial system and deny the defendant due process. Under the State's approach, the prosecution could prevent the defendant from obtaining expert assistance simply by declining to obtain an expert of its own. This would be particularly untenable where the issue is one as to which the defense bears the burden, such as an affirmative defense or a mitigating circumstance.

Likewise, the parameters of the right to assistance established in *Ake* do not in any way undermine the conclusion that *Ake* requires an independent expert. *See* State's Br. at 26. A defendant is entitled to "one competent expert" for the purposes *Ake* identified, 470 U.S. at 83,

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way mean that a defendant should have to share an expert with the prosecution simply because he cannot afford to retain one.

which means one competent expert who is independent of the prosecution and tasked with assisting the defense. A defendant does not get to choose an expert "of his personal liking." *Id.* But a defendant *does* get an independent expert whose responsibility is to work with the defense to present its case. An indigent defendant does not get to choose a lawyer of his own liking either, but that does not mean he has to share a lawyer with the prosecution. And while the Court gives the states discretion in how to implement a constitutional right, that discretion cannot be abused to undermine the core of the right—here, the independence of the expert. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) ("Although *Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled, States' discretion, we cautioned, is not unfettered.") (citations and quotation marks omitted).

Contrary to the State's assertion, *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), has no bearing on the question presented. If anything, this Court's discussion of *Smith* in *Ake* underscores the weakness of the State's position. In *Ake*, this Court expressed its "fundamental" disagreement with *Smith*, which was decided before the Court's "increased commitment to assuring meaningful access to the judicial process" and "was addressed to altogether different variables." *Ake*, 470 U.S. at 85. The Court explained that "we are not limited by [*Smith*] in considering whether fundamental fairness today requires a different result." *Id.*; *see also Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994) ("*Ake* expressly disavows the result in *Smith* and explains that the requirements of due process have fundamentally changed since that decision."). That the State would rely on a decision that the Court in *Ake* expressly disavowed speaks volumes.

The decisions of a handful of lower courts misinterpreting *Ake* do not cast doubt on the decision's clear holding, much less provide "near-conclusive evidence" that McWilliams's entitlement to relief under *Ake* was not clearly established. *See* State's Br. at 35. Just as lower courts may not supply clearly established law where this Court did not, so too they cannot change the meaning of what this Court did say. It is for this Court to determine what was clearly established; this Court has never held that the existence of contrary lower court authority controls the inquiry into whether a principle was clearly established.

Here, the great weight of authority favors McWilliams's interpretation, and, as the State acknowledges, several courts that once held that *Ake* did not require an independent expert now recognize that it does. *See* State's Br. at 38 n.8; *see also Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991); *De Freece v. State*, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993). The State dismisses these and other decisions as "confused," or as relying in part on the Criminal Justice Act. State's Br. at 42. That some of these courts also invoked the Criminal Justice Act does not change how they understood *Ake*. *See, e.g., United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989) ("The statute, and the Court's decision in *Ake*, recognize that independent expertise is often necessary in the subtle and complicated area of mental health."). Of course, *Ake* too cited the Criminal Justice Act as "reflect[ing] a reality that we recognize today," that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80.

Then-Justice Rehnquist's dissent in *Ake* confirms McWilliams's reading. The constitutional standard that Justice Rehnquist proposed in dissent—that a neutral expert is all that the Constitution requires—is the same standard that the State today implausibly ascribes to the opinion of the Court. If the Court in *Ake* held only what the State claims it held, Justice Rehnquist would have had no reason to dissent. Implicitly conceding as much, the State urges the Court to dismiss Justice Rehnquist's interpretation of the *Ake* majority opinion as hyperbole. State's Br. at 32-33. Even if dissenting justices may sometimes exaggerate the implications of a decision, that argument is misplaced here. Justice Rehnquist's dissent makes quite clear that the Court cannot have agreed with his position that due process requires only a neutral expert.[5]

After ascribing so little deference to Justice Rehnquist's dissent on the merits in *Ake* itself, it is ironic that the State would in the next breath insist that Justice Marshall's dissents from the denial of certiorari in a few post-*Ake* cases should be given determinative weight on the question of what *Ake* clearly established. *See* State's Br. at 35-36. "Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v.*

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5. The Court in *Ake* expressed no disagreement with Justice Rehnquist's interpretation of its holding, unlike the case the State cites, *United States v. Albertini*, 472 U.S. 675, 684 (1985). And in the State's other cited case on this point, *Chaidez v. United States*, 133 S. Ct. 1103, 1110 n.11 (2013), the Court did in fact look to the dissent to shed light on the significance of the majority opinion in *United States v. Padilla*, 559 U.S. 356 (2010).

Carver, 260 U.S. 482, 490 (1923)). The Court could well have denied certiorari for any number of reasons having nothing to do with whether the Court agreed with the lower courts' decisions on the merits.

Equally unavailing is the State's attempt to analogize to cases in which the Court has reversed circuit courts that erroneously granted relief by reading multiple precedents together to identify a "logical next step" that was not itself articulated in any single decision of this Court. State's Br. at 45. In *White v. Woodall*, 134 S. Ct. 1697 (2014), the Court declined to read three prior cases together to conclude that the right to a no-adverse-inference instruction at the penalty phase was clearly established, where no single decision had so concluded. *Id.* at 1702-04. By contrast, one need not stitch cases together to identify the right to an independent expert; *Ake* itself provides the right. And in *Carey v. Musladin*, 549 U.S. 70 (2006), the Court declined to extend precedents focused on state-sponsored courtroom conduct to include spectator conduct. Not only had the Court never addressed inherent prejudice related to spectator conduct, but the relevant legal test "suggest[ed] that those cases apply only to state-sponsored practices." *Id.* at 76. Unlike in *Musladin*, where the reasoning in the underlying decisions implicitly excluded spectator conduct, the role *Ake* explicitly envisions the expert to fulfill is premised on the expert being independent. *See Ake*, 470 U.S. at 80-84.[6]

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6. The State's reliance on *Knowles v. Mirzayance*, 556 U.S. 111 (2009), and *Glebe v. Frost*, 135 S. Ct. 429 (2014), is similarly misplaced. In *Knowles*, the respondent conceded that the Ninth Circuit's "nothing to lose" standard for effective assistance of counsel had never been recognized by the Supreme Court, and the Ninth Circuit cited no Supreme Court cases supplying

Nor is this case analogous to those in which this Court summarily reversed circuit courts that, often relying on their own precedent, defined legal principles at a high level of generality and then applied them to very different contexts. *See* State's Br. at 46-47. As the State concedes, these cases involved circumstances in which no Supreme Court decision "addresse[d], even remotely, the specific question presented by th[e] case." State's Br. at 47 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)). Here, McWilliams is not seeking to apply an abstract principle to an unanticipated context. *Ake* addresses concretely and in detail the need for an independent expert where the defendant's mental health is a significant factor in the case. *See Ake*, 470 U.S. at 79-85.

This Court has found clearly established law based on precedent much less clear than *Ake*. The State attempts to distinguish this Court's grant of relief in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), on the ground that the Court "had addressed the same Texas jury instruction five times and held them unconstitutional before." State's Br. at 48-49.[7] But four of those five times, this Court rejected

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that standard. *Knowles*, 556 U.S. at 121-22. In *Glebe*, the Court summarily reversed the Ninth Circuit for concluding, based on its own precedents, that Supreme Court precedent addressing the complete denial of summation applied equally to a trial court's requirement that a defendant choose between two alternative arguments in summation. 135 S. Ct. at 431.

7. Similarly, the State characterizes *Wiggins* as a mere application of an established legal standard to specific facts. The dissent took a different view, stating that "nothing in *Strickland*, or in any of our 'clearly established' precedents," supported the standard the Court applied. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting).

the defendant's challenge to the jury instruction, striking it down only once. *Abdul-Kabir*, 550 U.S. at 265 (Roberts, C.J., dissenting). Notwithstanding precedent that was described as "sharply divided, ebbing and flowing," *id.* at 266 (Roberts, C.J., dissenting), the Court identified clearly established law. Unlike in *Abdul-Kabir*, there is no contrary Supreme Court authority here, and thus none that needs to be explained away. *Ake* itself is the source of the right to an independent expert, and the explanations of *Ake* in this Court's subsequent opinions only reinforce this conclusion. *See, e.g.*, *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion).

II. The Case Should Be Remanded to the Eleventh Circuit for a Proper Prejudice Inquiry.

The State contends that McWilliams received all the assistance he requested and suffered no prejudice. State's Br. at 50-56. As an initial matter, the State advanced the argument that McWilliams received what he requested in its Brief in Opposition. State's Br. in Opp. to Cert. at 18. By granting the Petition, however, the Court has already rejected that argument. *See, e.g.*, *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) ("We accordingly rejected the incumbents' claim of waiver when they raised it in opposition to the petition for certiorari, and we reject it again today."). Indeed, every court that has reviewed McWilliams's case has understood his *Ake* claim for independent expert assistance to be properly presented and has addressed it on the merits. J.A. 33a-36a, 86a-90a, 105a-106a.[8] It is likewise properly presented here. *See*

8. The State argues that the Alabama Court of Criminal Appeals denied McWilliams's *Ake* claim on direct appeal "not

Stevens v. Dep't of Treasury, 500 U.S. 1, 8 (1991) ("We rejected that argument in granting certiorari, and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented."); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (recognizing the propriety of granting certiorari as long as the question presented was addressed by the courts below). Regardless, McWilliams did not receive what he requested. Defense counsel explained at sentencing that they needed expert assistance in order to present evidence of McWilliams's mental condition in mitigation. J.A. 207a, 210-11a.[9] Counsel never received that assistance, and the judge imposed the death penalty.

The denial of expert assistance prejudiced McWilliams. This has always been a close case as to sentencing. The

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because of any ruling about independent psychiatrists, but because McWilliams had received the psychiatric assistance that he had requested." State's Br. at 51. However, McWilliams argued before that court that he had a right to an expert other than Dr. Goff to assist his counsel in preparing and presenting their mental health evidence. Appellant's Br. at 48-52 (Vol. 11, Tab #R-33). The court held that the appointment of Dr. Goff was sufficient because *Ake* did not require anything more than a neutral expert. J.A. 105a-106a.

9. Counsel made clear that the reason for their continuance request was that they needed expert assistance. *See, e.g.*, J.A. 207a ("[W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him."), 211a ("I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me."). Also, counsel never sought a "prolonged" or "indefinite" continuance of the sentencing hearing. *See* State's Br. at 8, 20. They did not specify the length of any continuance, but they stressed its purpose—to give them time to consult with an independent expert. J.A. 207a.

jury returned just ten votes for death—the minimum required for a death recommendation under Alabama law. *See* Ala. Code § 13A-5-46(f) (1981). Both the Alabama Supreme Court and the Eleventh Circuit have recognized that 10-2 cases are necessarily close, and therefore it is more likely in such cases that a sentencing error prejudiced the defendant. *See Cave v. Singletary*, 971 F.2d 1513, 1519 (11th Cir. 1992) (finding prejudice as to sentencing in part because "despite the presentation of no mitigating circumstances, Cave came within one vote of being spared execution"); *Ex parte Stephens*, 982 So. 2d 1148, 1154 (Ala. 2006) (holding that an error was harmful in part because even with the error, "two jurors voted for a sentence of life imprisonment without parole").[10] The State's contention that McWilliams could not have been prejudiced by any *Ake* error because of the nature of his offense and the jury's vote for death is contrary to both the facts and the law. State's Br. at 20, 53.

The Eleventh Circuit's divided resolution below further underscores that McWilliams's mental health was critical to the outcome at sentencing. Judge Wilson dissented and found that the *Ake* error was prejudicial. J.A. 60a-63a. He explained that the absence of expert assistance prevented defense counsel from countering

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10. *See also Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (holding that the petitioner pled sufficient prejudice in part because "even without the substantial and compelling mitigation that trial counsel failed to discover and present, Mr. Daniel's jury voted 10 to 2 for death based on the brief testimony of his mother"); *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002) (explaining that the trial court's assessment of the jury's vote must "depend upon the number of jurors recommending a sentence of life imprisonment without parole").

the trial judge's belief that McWilliams did not have any serious mental health issues because he had malingered on certain tests. J.A. 60a-61a. Judge Jordan concurred but stated explicitly that the issue was "close, for the reasons outlined in Judge Wilson's dissent." J.A. 49a. Judge Jordan then explained that the reason he declined to find prejudice was that "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." J.A. 49a. But he did not consider the impact an independent expert would have had. The per curiam opinion used similar language, stating that "[a] few additional days to review Dr. Goff's findings" would not have made a difference. J.A. 36a. The question is not how additional time with Dr. Goff would have benefited the defense. The question is how an independent expert would have benefited the defense by evaluating Dr. Goff's report and McWilliams's mental health records, and assisting counsel in preparing and presenting a case for life—a question the Eleventh Circuit never addressed, and should be given the opportunity to address on remand.

Dr. Goff's report, although brief, was highly significant because it revealed organic brain dysfunction—a mitigating fact that needed to be communicated effectively to the sentencer. This is why the Court held in *Ake* that indigent defendants have a right to an expert who can "translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." *Ake*, 470 U.S. at 80. The trial judge discounted the importance of Dr. Goff's finding of organic brain dysfunction based on his lay view that McWilliams was "feigning, faking, and

manipulative." J.A. 188a.[11] But no one had provided any explanation to the judge as to the relationship among malingering, McWilliams's mental health issues, and the tests that were administered that showed genuine brain dysfunction. Such analysis is necessarily nuanced, and is precisely why the Court in *Ake* held that, unlike a lay person, an independent psychiatrist responsible for assisting the defense "can identify the 'elusive and often deceptive' symptoms of insanity." *Ake,* 470 U.S. at 80 (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950)). As a group of psychiatric and psychological associations noted in their brief as *amici curiae* in this case, "Malingering is not inconsistent with serious mental illness; it is not clear that the trial court was aware of this fact."[12]

Finally, McWilliams did not receive assistance from "a partisan consulting psychologist" at the time of the judicial sentencing. *See* State's Br. at 2, 6, 51. A local psychologist, Dr. Marianne Rosenzweig, spoke with counsel on a voluntary basis in her spare time before counsel received any of the critical reports and records that arrived in the forty-eight hours before the sentencing hearing.[13] J.A.

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11. The judge stated that McWilliams's organic brain dysfunction did not rise to the level of a mitigating circumstance, but even if it did, the aggravating circumstances still would outweigh the mitigating circumstances. J.A. 188a. The judge did not explain how he could meaningfully weigh the mitigating effect of evidence that he did not find mitigating.

12. Brief of American Psychiatric Association, American Academy of Psychiatry and the Law, and American Psychological Association as *Amici Curiae* in Support of Petitioner at 20 (filed herein Mar. 6, 2017).

13. The State asserts that "McWilliams's brief elides" the fact that a local psychologist volunteered some advice and argues

192a-193a; P.C.T. 251-52. An indigent defendant does not lose his right to an *Ake* expert simply because his counsel obtained informal assistance from a friend or volunteer. *See Cowley v. Stricklin*, 929 F.2d 640, 644-45 (11th Cir. 1991) (finding an *Ake* violation even though counsel, after being denied an expert, convinced a psychologist who was a personal friend to give advice and testify based on a limited review of the defendant's records).

The State invokes the "fairness" principles of due process, State's Br. at 28, but there is nothing fair about a capital case in which the critical mental health reports and records were dumped on defense counsel within forty-eight hours of the sentencing hearing and counsel had no opportunity to review them with an independent expert, determine their value, and present evidence to the court.

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it is a reason that the Court might "choose to dismiss the writ as improvidently granted." State's Br. at 2, 51 n.17. However, the State did not mention the psychologist's involvement in its brief in opposition to McWilliams's petition for certiorari. *See* S. Ct. R. 15.2 (requiring an "objection to consideration of a question presented based on what occurred in the proceedings below"); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 & n.14 (2010). Nor did the State assert that the psychologist was a basis for denying relief under *Ake* in its brief to the Eleventh Circuit, in the District Court, or in the state courts, and no court—state or federal—has mentioned the psychologist in its *Ake* analysis. The testimony relied on by the State came during the post-conviction hearing in June of 2000 and could not possibly have been a basis for the decision of the Alabama Court of Criminal Appeals in 1991.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit and remand this case for further proceedings.

Respectfully submitted,

DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
(202) 220-1100

JOSHUA S. MELTZER
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, California 94105
(415) 512-4000

STEPHEN B. BRIGHT
Counsel of Record
MARK LOUDON-BROWN
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, Georgia 30303
(404) 688-1202
sbright@schr.org

Counsel for Petitioner

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR - 6 2017
OFFICE OF THE CLERK

No. 16-5294

IN THE
Supreme Court of the United States

JAMES E. MCWILLIAMS,
Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, AND AMERICAN PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID W. OGDEN
DANIEL S. VOLCHOK
ALEXANDRA STEWART*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
(202) 663-6000
* (Admitted only in Tennessee; supervised by members of the firm)
Counsel for American Psychological Association

AARON M. PANNER
Counsel of Record
T. DIETRICH HILL*
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@kellogghansen.com)
* (Admitted only in New York; supervised by members of the firm)

March 6, 2017

(Additional Counsel Listed On Inside Cover)

DEANNE M. OTTAVIANO
NATHALIE F.P. GILFOYLE
AMERICAN PSYCHOLOGICAL
ASSOCIATION
750 First Street, N.E.
Washington, D.C. 20002
(202) 336-5500
Counsel for American
Psychological Association

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. Members of the American Psychiatric Association engage in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. The American Psychiatric Association and its members have substantial knowledge and experience relevant to the issues in this case. The American Psychiatric Association has frequently participated as an *amicus* in this Court, including in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 1,800 psychiatrist members, is the leading national organization of physicians who specialize in forensic psychiatry. AAPL is dedicated to excellence in practice, teaching, and research in forensic psychiatry. AAPL members evaluate defendants in all aspects of the criminal justice system and adhere to the principle of honesty and strive for objectivity. AAPL has participated as an *amicus curiae* in other cases before this Court, including *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Ryan v. Gonzales*, 133 S. Ct. 696 (2013); *Brown v. Plata*, 563 U.S. 493 (2011); *Indiana v. Edwards*, 554

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

Amicus American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, the American Psychological Association has approximately 115,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the American Psychological Association's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare. The American Psychological Association has filed more than 155 *amicus* briefs in state and federal courts nationwide. These briefs have been cited frequently by courts, including this Court. *See, e.g., Hall v. Florida*, 134 S. Ct. 1986, 1994-95, 2000-01 (2014); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

STATEMENT

1. Petitioner James McWilliams was convicted of the rape and murder of a clerk at a convenience store. *See McWilliams v. State*, 640 So. 2d 982, 986 (Ala. Crim. App. 1991). The day after the guilty verdict, a capital sentencing hearing was held in front of the jury. At that hearing, McWilliams testified about head injuries he had suffered as a child and further testified that he had been seen by several mental health professionals both before his arrest and while in state custody. He also read from the report of a psychologist who evaluated him prior to his arrest. McWilliams' mother testified about his injuries and subsequent changes in his behavior and about recommendations for mental health treatment (which were not followed). In rebuttal, the State called a psychiatrist and a psychologist from the state mental hospital, who testified that McWilliams was a malingerer and not psychotic. The jury voted (10-2) to recommend the death penalty.

In Alabama, the jury's recommendation is not binding, and the trial court held a judicial sentencing hearing approximately six weeks later. Before that hearing, the defense sought neuropsychological testing; a clinical neuropsychologist employed by the State's Department of Mental Health found (in a report provided to the court, the prosecution, and the defense two days prior to the judicial hearing) that McWilliams had "organic brain dysfunction." In addition, McWilliams' counsel received, on the day prior to the hearing, updated records from the state mental hospital and, on the morning of the hearing, records from the state prison that the defense had subpoenaed before trial. The prison records stated that McWilliams had been treated with psychiatric

medications, including Mellaril, a drug used to treat psychotic illnesses such as schizophrenia.

Confronted with this additional evidence, defense counsel moved for a continuance and told the court that he would require the assistance of a mental health expert in evaluating both the report of the neuropsychological expert and the medical records. The trial court denied the request. During closing arguments, defense counsel explained that, without expert assistance, he was unable to present evidence of mitigation based on McWilliams' mental illness or incapacity. The trial court sentenced McWilliams to death, expressly finding that McWilliams had malingered and was not psychotic and that his claimed mental illness was not a mitigating factor.

2. On direct appeal, the Alabama Court of Criminal Appeals rejected McWilliams' argument that he had been denied his right to the assistance of a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The court held that "the requirements of *Ake* . . . are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing [a neuropsychologist] to examine the appellant." *McWilliams*, 640 So. 2d at 991.

The Alabama Supreme Court affirmed the conviction without addressing the *Ake* issue McWilliams had raised, and state courts denied post-conviction relief. McWilliams then sought post-conviction relief in federal court. The district court denied relief; the Eleventh Circuit granted a Certificate of Appealability to review, among other things, whether McWilliams had demonstrated a violation of his rights under *Ake v. Oklahoma*. A divided panel of the court of appeals affirmed. The per curiam majority held

that *Ake* was satisfied because a state-appointed expert examined McWilliams and produced a report, even though that expert was not a member of the defense team and the expert's report was disseminated simultaneously to the defense, the prosecution, and the court. The court indicated that McWilliams "could have called [that expert] as a witness." Pet. App. 35a.

SUMMARY OF ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court made clear that, whenever a defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist." *Id.* at 83.[2] The Court's opinion in *Ake* makes unmistakably clear that, where a fact-finder may be required to resolve potentially competing views related to the mental state of a criminal defendant for purposes of determining guilt or, in a capital case, punishment, access to an expert independent of the prosecution is constitutionally required.

Ake was fundamentally concerned with the "proper functioning of the *adversary* process" and the need to provide necessary "tools of an adequate defense or appeal" to "defendants who cannot afford to pay for them." *Id.* at 77 (emphasis added, internal quotation marks omitted). Where mental illness or disability is at issue, access to a defense-side expert is critical to permit the defendant to explore trial strategies and to consider the viability of defenses without putting

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[2] The Court in *Ake* referred specifically to a psychiatrist because that was what Ake's counsel requested before trial. *Ake* is universally understood, however, to encompass qualified psychologists and other mental health experts.

his right against self-incrimination at risk. Moreover, access to a defense-side expert also provides potentially essential assistance to defense counsel in preparing to cross-examine the State's expert. That adversarial testing of expert testimony benefits not only the defense, but also the fact-finder, because it provides a basis for assessing the strengths of varying opinions. The Court's opinion in *Ake* embraced all of these rationales. An expert who is not independent of the prosecution cannot fulfill the roles that the Court recognized, more than 30 years ago, may be essential to a fair trial.

As applicable here, *Ake* further clearly established that when, "in the context of a capital sentencing proceeding," the State relies on testimony by mental health experts, "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, *and to assistance in preparation at the sentencing phase.*" *Id.* at 84 (emphasis added). In *Ake*, the relevant issue was future dangerousness, whereas in this case it was whether mental illness was a factor mitigating against the death penalty. The principle articulated in *Ake* nevertheless clearly applies: it is precisely the assistance that this Court held "due process requires" that the trial court denied to McWilliams.

ARGUMENT

I. *AKE* CLEARLY ESTABLISHED THE RIGHT TO THE ASSISTANCE OF A QUALIFIED MENTAL HEALTH EXPERT INDEPENDENT OF THE PROSECUTION

The Question Presented is whether this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), "clearly establish[ed]," for purposes of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, that an indigent defendant, when circumstances warrant, is entitled to the assistance of a mental health expert who is independent of the prosecution. The answer to that question is yes.

A. Before This Court Decided *Ake*, the Law Had Moved Away from the "Neutral Examination" Model to an "Adversarial Expert" Model

Ake reflects a recognition that determinations concerning a defendant's mental state at the time of a serious crime require a fact-finder to make sense of clinical evidence that may be largely incomprehensible to a lay jury. Before *Ake* was decided, the legal and mental health professions had already recognized that adversarial presentation and testing is essential for that purpose – and that, accordingly, a criminal defendant must have the assistance of an *independent* expert, that is, an expert who is not also working with the prosecution or on behalf of the court.

1. Historically, many States provided for only a neutral evaluation by one or more court-appointed experts when a defendant's mental state was at issue. *See, e.g., United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953). Statutes providing for such

an evaluation by an expert or panel – sometimes referred to as a "lunacy commission" – generally left appointment to the trial court's discretion, rather than giving the defendant the right to demand one. *See, e.g., Coon v. State*, 179 So. 2d 710, 711 (Ala. 1965); *State v. Geelan*, 120 N.W.2d 533, 535 (S.D. 1963).

Some courts, legislatures, and commentators recognized that this approach raised concerns about fairness, including constitutional concerns. Without expert assistance, for example, defendants would in some cases be unable even to raise a defense based on the defendant's mental state at the time of the offense. Indeed, then-Chief Judge Cardozo deemed it "a matter of common knowledge[] that upon the trial of certain issues, such as insanity or forgery, experts are often *necessary* both for prosecution and for defense." *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929) (emphasis added). An expert equally available to the prosecution also forced defendants to risk their right to avoid self-incrimination by submitting to examination – the contents of which would not be protected by any privilege – simply to determine whether a defense was viable. *See* Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 497 (1980);[3] *see also* Craig Bowman, Note, *Indigent's Right to an Adequate Defense Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 637-42 (1970)[4] (arguing that denial of an inde-

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[3] *Available at* http://www.law.virginia.edu/pdf/faculty/hein/bonnie/66va_1_rev427_1980.pdf.

[4] *Available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3811&context=clr.

pendent expert could violate Sixth and Fourteenth Amendments).

For similar reasons, the "neutral examination" also hampered reliable evaluation of a defendant's mental state. The reliability of a mental health professional's examination is undercut when the defendant has a "powerful legal disincentive to full disclosure" – namely, "the defendant's fear that what he says during the forensic evaluation will be used against him in court." Bonnie & Slobogin, 66 Va. L. Rev. at 497. A "defense expert" can conduct an examination (and collect other data) without fear that any information gathered will be used against the defendant, unless and until the defendant chooses to put his mental state at issue.

Just as important, "[t]he adversarial system requires" mental health professionals "for both sides." Alan A. Stone, *The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower*, 12 Bull. Am. Acad. Psychiatry & L. 209 (1984), *as reprinted in* 36 J. Am. Acad. Psychiatry & L. 167, 171 (2008).[5] In psychiatric and psychological evaluation, given the uncertainties of determining long-past mental states, defining causal pathways for criminal behavior, and similar tasks, "little . . . can be spoken of in terms of certainty." Paul S. Appelbaum, *Psychiatric Ethics in the Courtroom*, 12 Bull. Am. Acad. Psychiatry & L. 225, 226 (1984).[6] In an area where conscientious experts may reach different conclusions, adversarial presentation of different expert opinions fosters the truth-finding process. *See, e.g.*, Bonnie & Slobogin, 66 Va. L. Rev. at 452-95 (suggesting approaches to

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[5] *Available at* http://jaapl.org/content/jaapl/36/2/167.full.pdf.

[6] *Available at* http://jaapl.org/content/jaapl/12/3/225.full.pdf.

help ensure that "clinical testimony" can "enlighten rather than confuse or obstruct the administration of criminal justice"); *see also* American Academy of Psychiatry & the Law, *Ethics Guidelines for the Practice of Forensic Psychiatry*, Guideline IV (2005)[7] (psychiatric experts should "adhere to the principle of honesty" and "strive for objectivity"). The adversarial expert model allows a fact-finder to assess multiple opinions and understand why they differ. (Where multiple mental health issues are contested, multiple experts with different areas of expertise may be needed.) Furthermore, the risk that a jury may ascribe too much weight to an expert opinion is mitigated by adversarial presentation.

By the time *Ake* was before this Court, at least 42 States recognized a defendant's right to an expert independent of the prosecution when necessary to his defense, *see Ake*, 470 U.S. at 78 n.4 (compiling state statutes and court decisions). Federal law likewise provided at the time that indigent federal defendants were entitled to funds to retain necessary experts. *See* Criminal Justice Act of 1964, Pub. L. No. 88-455, § 2, 78 Stat. 552, 553 (codified, as amended, at 18 U.S.C. § 3006A(e)).

The contemporaneous American Bar Association's Criminal Justice Mental Health Standards, approved in 1984 and published in 1986, also reflect the model of the adversarial expert, who plays a dual role as both evaluator of the defendant and consultant to the attorneys. *See generally* Am. Bar Ass'n, ABA Criminal Justice Mental Health Standards 7-1.1 commentary, at 6-13 (1986) ("ABA Standards").[8]

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[7] *Available at* http://www.aapl.org/ethics.htm.

[8] In 2016, the ABA adopted its new Criminal Justice Standards on Mental Health (2016), *available at* http://www.

Rather than relying on a "neutral" court-appointed expert or panel, the ABA Standards "attempt to ensure a fair adjudication of [mental health-based] defenses by affording both sides as much access to relevant information as is constitutionally permissible." ABA Standards Intro. to Part VI, at 327. Thus, they provide that a defendant must have "an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense" and that the government should provide funds for indigent defendants to do so. ABA Standards 7-3.3(a), at 79.

The Standards also criticize court-appointed "neutral" experts as risking unfairness at trial, because "[j]uries may be led to believe that a 'court's experts' are more credible or impartial than defense or prosecution experts because of the judicial imprimatur implicit in judicial appointments." ABA Standards 7-6.4 commentary, at 365. The quality of expert testimony depends on the depth and care of the qualified mental health expert's investigation, as well as the expert's level of expertise. Appointment by the court thus does not make an expert "inherently superior to any others, and the legal system should not foster a contrary conclusion." *Id.* (footnote omitted).

Further supporting the defendant's right identified in Standard 7-3.3, the standards for providing notice of a defendant's intent to offer expert testimony specifically seek to preserve the "maximum scope for

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americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html. The commentary is not yet publicly available, but Standard 7-3.3 in the 2016 Standards is materially identical to Standard 7-3.3 in the 1986 Standards, quoted above.

defense attorneys . . . to explore strategic and tactical alternatives . . . before committing themselves to a specific defense theory." ABA Standards 7-6.4 commentary, at 363. The Standards thus recognize the importance of a defendant being able to consult with a mental health expert before trial so that the lawyers can take expert opinion into account in shaping trial strategy – consultation that is not feasible with a "neutral" expert.

In sum, when this Court decided *Ake*, there was a prevailing view that a defendant should have access to a mental health expert independent of both the prosecution and the court to assist in adversarial presentation of relevant evidence.

2. The parties' briefs in *Ake* made clear that what was at issue in that case was the right to defense-side expert *assistance*, and not merely a neutral evaluation. The petitioner's opening brief, for example, argued that a neutral examination could not "satisfy the defendant's need for expert assistance." Brief for the Petitioner at 19-20, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 2, 1984), 1984 WL 564026.

> [A]n independent expert may come to a different conclusion [from a government expert]. But the defendant's need for an expert is not based only on that possibility, important as it is. An expert serves many crucial purposes in litigation other than testifying at trial. At the very outset of a case, an expert may be necessary to evaluate the facts and lay a groundwork for future investigation and trial strategy. . . . If the case goes forward, counsel often needs an expert for assistance in becoming an expert in the field [himself], and then to understand the intricacies

> of the case sufficiently to try it successfully. In helping the attorney prepare for trial, an expert will advise counsel about the facts and theories that counsel may face from the opposing side. She may be able to refer counsel to relevant studies and data not otherwise available to him, and can assist in preparing for the examination of witnesses – especially the cross-examination of the other party's experts.

Id. at 20 (internal quotation marks and citations omitted) (last alteration in original).

The respondent in *Ake* identified the kind of right the petitioner was seeking: a "constitutional right to have a psychiatric expert provided to an indigent." Brief of Respondent at 34, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed Aug. 20, 1984), 1984 WL 564027. As the respondent put it, if the Court ruled in favor of Ake,

> [v]irtually every defendant who had a mental problem before or after a crime would claim the right to funds for *independent* psychiatric examinations to determine if he or she was insane at the time of the crime, or if even a reasonable doubt existed as to sanity . . . .

Id. at 47 (emphasis added).

3. *Amicus* briefs filed by the American Psychiatric Association and the American Psychological Association in *Ake* emphasized the importance of expert assistance to ensure adequate adversarial presentation regarding the defendant's mental state. That point was emphasized in particular with respect to cases where, as here, the prosecution relies on expert testimony at the penalty phase of a capital case.

The *amicus* brief filed by the American Psychiatric Association articulated a number of arguments

demonstrating the need to provide an indigent defendant assistance of a psychiatric expert. One central concern was that, in investigating a potential insanity defense, for example, defense counsel have the opportunity for a confidential examination and consultation (whether the expert be appointed by the trial court or selected by the defendant). An examination undertaken for purposes of investigating a potential defense to a criminal charge is generally not protected by therapist-patient or physician-patient privilege (as it is not undertaken for the purpose of treatment), but an examination undertaken to assist the defense is protected by the attorney-client privilege. *See* Brief *Amicus Curiae* for the American Psychiatric Association at 17 & n.12, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 11, 1984) ("Psychiatrists' *Ake* Brief"), 1984 U.S. S. Ct. Briefs LEXIS 1514.

The brief explained that confidentiality is "important for the conduct of a valid psychiatric examination" because it allows the defendant to speak freely. *Id.* at 18. "[A] criminal defendant will not divulge all necessary information concerning his mental state unless he is given adequate assurances of confidentiality." *Id.* At least as important, without a confidential examination, an indigent defendant is seriously disadvantaged in his ability to investigate and support defenses related to mental state. *See id.* at 12; *see also* Bonnie & Slobogin, 66 Va. L. Rev. at 497.

The Psychiatrists' *Ake* Brief also explained why a defendant requires the assistance of a psychiatric expert to rebut expert evidence offered at the sentencing phase of a capital trial. In *Ake*, the defendant's future dangerousness was at issue at the sentencing hearing, and the prosecution offered psychiatric expert testimony against the defendant.

See Ake, 470 U.S. at 86. In *Barefoot v. Estelle*, 463 U.S. 880, 899-902 (1983), this Court held that such opinion testimony is consistent with due process despite its unreliability. The brief pointed out that *Barefoot* was premised on the recognition that the defendant would be permitted to submit opposing testimony and to cross-examine the prosecution's expert. Psychiatrists' *Ake* Brief at 20; *see Barefoot*, 463 U.S. at 900-01. Thus, "the defense must be given the opportunity to challenge the scientific basis for such predictions through the testimony of its own psychiatric expert" in addition to thorough cross-examination. Psychiatrists' *Ake* Brief at 20; *see also* Emily J. Groendyke, Ake v. Oklahoma: *Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367, 385 (2007)[9] ("A single 'neutral' expert who makes . . . mistakes, but who faces no opposing expert, may never be exposed.").

The brief filed by the American Psychological Association in *Ake* likewise emphasized the need for "access to expert assistance and testimony necessary to the cross-examination and rebuttal" of expert witnesses presented by the prosecution at the penalty phase of a capital case. Brief of *Amici Curiae* American Psychological Association and Oklahoma Psychological Association in Support of Petitioner at 28, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 11, 1984) ("Psychologists' *Ake* Brief"), 1984 U.S. S. Ct. Briefs LEXIS 1516. The brief described the crucial role of a mental health expert in evaluating the defendant's mental state, explaining that "the detection and diagnosis of mental disorders and the

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[9] *Available at* http://www.nyujlpp.org/wp-content/uploads/2012/11/GROENDYKE-AKE-V.-OKLAHOMA-PROPOSALS-FOR-MAKING-THE-RIGHT-A-REALITY.pdf.

assessment of facts relevant to mental processes is recognized to be well beyond the competence of most lay people." *Id.* at 4. Moreover, the brief elaborated, "[e]ven if the lay person can recognize in the defendant signs of cognitive or emotional disturbance, professional training or experience often may be required to elicit more detailed information." *Id.* at 16. But if the expert is equally available to the prosecution, the defendant will likely be unwilling to share unfavorable facts with the expert – thus preventing the expert from "elicit[ing] more detailed information." *Id.*

The Psychologists' *Ake* Brief went on to emphasize the need for a defense-side mental health expert at sentencing. In addition to rebutting the government's expert by offering opposing testimony, the brief explained, a defense expert could "help [counsel] prepare for cross-examination" of the witness, a difficult task without specialized knowledge. *Id.* at 27. Like the Psychiatrists' *Ake* Brief, the Psychologists' *Ake* Brief highlighted this Court's decision in *Barefoot*, which "strongly implied that if the trial court had refused to provide an expert for an indigent defendant, so that there could be no opposing views of the defendant's doctors," the state expert's testimony could not be admitted. *Id.* at 29 (internal quotation marks omitted). Indeed, the brief argued, the defendant's access to his own expert is "essential to the integrity of the adversary process in which the reliability of such testimony must be tested." *Id.* at 30.

In conjunction, the two *amicus* briefs provided three important justifications for a defense expert independent of the prosecution. *First*, an initial examination of the defendant must be confidential to be effective. *Second*, the inherent uncertainty of

opinions concerning a defendant's mental state requires that a defendant be able to offer opposing expert testimony through the adversarial process. And, *third*, defense counsel is likely to be able to cross-examine a prosecution expert effectively only if advised by an expert.[10]

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[10] In this case, as in *Ake*, the prosecution relied on expert testimony at the penalty phase of a capital proceeding, making this an especially straightforward case for requiring provision of an expert at the request of the defense. In any event, the right to expert assistance under appropriate circumstances extends to any capital defendant who seeks to offer affirmative mitigating evidence at the sentencing hearing regardless of whether the prosecution offers expert testimony. *See generally* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (rev. ed. Feb. 2003) ("ABA Death Penalty Guidelines") (requiring "at least one [team] member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments," and "[c]ounsel should have the right to have [needed] services provided by persons independent of the government"), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf. The ABA commentary further notes that "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." *Id.*, Guideline 4.1 commentary. Indeed, counsel may be constitutionally inadequate for failing to investigate adequately possible mitigating evidence, *see Wiggins v. Smith*, 539 U.S. 510, 536 (2003); yet "[c]ounsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance," ABA Death Penalty Guidelines, Guideline 4.1 commentary (footnote omitted). Even to know whether investigation is warranted may require the assistance of a mental health expert.

B. *Ake* Clearly Established the Right to a Defense Mental Health Expert Independent of the Prosecution

Ruling in favor of the petitioner in *Ake*, the Court's decision clearly established the right of an indigent defendant, under appropriate circumstances, to a mental health expert independent of the prosecution.

1. *Ake* framed the question presented in that case in terms of the "proper functioning of the *adversary process*" and recognized that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly *within the adversary system*.'" 470 U.S. at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)) (emphases added). The Court's references to the adversary system and process are inconsistent with the notion of a neutral expert. The Court noted the "reality . . . that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the *assistance* of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80 (emphasis added).[11]

This Court explained that, in assisting the defense, "psychiatrists gather facts, through professional examination, interviews, and elsewhere, . . . analyze the information gathered and . . . offer opinions about how the defendant's mental condition might have affected the behavior at the time in question." *Id.* Furthermore, the assistance of qualified mental health experts is essential "in preparing the cross-examination of a State's psychiatric witnesses," because

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[11] As noted above, the Court discusses psychiatric testimony because the petitioner in *Ake* framed his request for relief in terms of the assistance of a psychiatrist, but *Ake* applies equally to any qualified mental health expert.

they "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Id.* at 80, 82. An expert who is not independent of the prosecution cannot help defense counsel prepare for cross-examination.

The Court also noted that "[p]sychiatry is not . . . an exact science." *Id.* at 81. Opinions about a defendant's mental state are inherently uncertain; "psychiatrists disagree widely and frequently." *Id.* The adversary system approaches that uncertainty by having the jury "resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party," so that "the psychiatrists *for each party* enable the jury to make its most accurate determination of the truth." *Id.* (emphasis added). Expert assistance not only helps the defendant present his case, but also serves the institutional goal of fair and accurate adjudication – a benefit, as the Court stated, that requires each party to proffer its own expert.

2. The Court also recognized, as *amici* had argued, that the determination in *Barefoot* that the Constitution permitted the prosecution to introduce expert testimony on the question of future dangerousness was premised "on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'" *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 898-99).

Justice Rehnquist's dissent likewise acknowledged this principle. *See id.* at 91 (Rehnquist, J., dissenting) ("There may well be capital trials in which the State . . . makes significant use of psychiatric testimony in carrying its burden, where 'fundamental fairness' would require that an indigent defendant

have access to a court-appointed psychiatrist to evaluate him *independently* and . . . contradict such testimony.").

We submit that, as the record appears, this case falls squarely within this rationale of *Ake*. Indeed, the circumstances here demonstrate the need for access to a defense-side expert. At the penalty phase, an important question arose as to whether McWilliams' brain injury and other mental illness was a mitigating factor. The State introduced expert testimony on that issue; moreover, immediately prior to judicial sentencing, additional evidence on McWilliams' mental state (some of which had been requested from the state prison before trial but not produced) became available for the first time.

Defense counsel indicated that he could not fairly represent the defendant without the assistance of an expert. Had such assistance been provided, the trial judge might have concluded that, whether or not the defendant was malingering, his mental illness was a mitigating factor. Malingering is not inconsistent with serious mental illness; it is not clear that the trial court was aware of this fact. *See* Mary Alice Conroy & Phylissa P. Kwartner, *Malingering*, 2 Applied Psychol. Crim. Just. 29, 30-31 (2006)[12] ("Malingering and mental illness are not mutually exclusive phenomena."). "In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access . . . to assistance in preparation at the sentencing phase." *Ake*, 470 U.S. at 84 (majority).

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[12] *Available at* http://dev.cjcenter.org/_files/apcj/2_3_Malingering.pdf.

II. THIS COURT'S DECISIONS SINCE *AKE* HAVE BEEN PREMISED ON DEFENSE ACCESS TO THE ASSISTANCE OF A MENTAL HEALTH EXPERT

Since *Ake*, this Court has repeatedly relied on the assumption that a capital defendant has the right to obtain assistance from a defense-side mental health expert independent of the prosecution.

A. *Ford v. Wainwright*

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the execution of an incompetent person violated the Eighth Amendment. *See id.* at 409-10 (majority opinion). A majority also determined that Florida's procedures for establishing a person's competency to be executed were constitutionally inadequate. Although a panel of three psychiatrists had evaluated the defendant, the Court held that the inability of the defendant to present his *own* expert rendered the procedure deficient. Referring specifically to *Ake*, Justice Marshall's plurality opinion emphasized "the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state." *Id.* at 414 (plurality opinion). The principle of *Ake* carried over to this context:

> The same holds true after conviction; without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

Id.[13]

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[13] *Ford* was decided before the trial and sentencing in this case.

Thus, in *Ford*, as in *Ake*, the defendant was entitled to more than an examination by a competent expert; he was entitled to present testimony from his own mental health expert.[14] Justice Powell's concurring opinion found Florida's procedures for establishing competency inadequate for the same reason: the decision was "made *solely* on the basis of the examinations performed by state-appointed psychiatrists," which "invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). At the very least, Justice Powell would have required "an impartial officer or board that can receive evidence and argument from the prisoner's counsel, *including expert psychiatric evidence that may differ from the State's own psychiatric examination.*" *Id.* at 427 (emphasis added).

While *Ford* did not address the right of an indigent defendant to obtain his own expert at the expense of the State, the opinions make evident that the *kind* of expert necessary to ensure a fair procedure is the same as in *Ake*: an expert who works on behalf of the defendant, independent of the prosecution.

B. *Wiggins v. Smith*

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court held that a failure to investigate potential mitigating

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[14] The plurality identified a "related flaw," as well: "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions." 477 U.S. at 415 (plurality opinion). While the opinion did not discuss the role of the defendant's expert in this capacity, for all of the reasons identified above, an effective cross-examination will often require expert assistance.

evidence may constitute ineffective assistance of counsel. In *Wiggins*, defense counsel had consulted a psychologist, who examined the defendant; but neither counsel nor the expert investigated the defendant's life history. *See id.* at 523-25. Implicit in the Court's analysis is that consulting a mental health expert was necessary, but not sufficient, for an adequate investigation into mitigating evidence.

In many circumstances, however, counsel can fulfill that obligation only if the defendant has a right to an expert independent of the prosecution. Without knowing what an examination will reveal, counsel must choose either to seek an examination and risk an unfavorable result that could generate evidence for the prosecution, or to forgo an examination and risk providing constitutionally ineffective assistance. *See generally* Elizabeth F. Maringer, Note, *Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts*, 62 Fordham L. Rev. 653 (1993).[15] *Wiggins* is thus fairly read to be premised on the understanding that – under *Ake* – a defendant is entitled to psychiatric assistance that is independent of the government.

C. *Panetti v. Quarterman*

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court reaffirmed the holding of *Ford* and invalidated another State's procedures for determining competence to be executed. The Texas state court in *Panetti* made its competency finding "solely on the basis of the examinations performed by the psychiatrists it had appointed" and "failed to provide petitioner with

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[15] *Available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3067&context=flr.

an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts." *Id.* at 951. This Court refused to defer to the state-court finding under AEDPA because that procedure violated the constitutional minimum under Justice Powell's opinion in *Ford* – which, the Court explained, constituted "clearly established law" for AEDPA's purposes, *id.* at 949.

Of particular relevance, the state court never ruled on the defense's motion for "funds to hire a mental health expert," giving the defense neither the time nor the resources to respond to the report of the court-appointed psychiatrists. *Id.* at 951; *see also id.* at 976 (Thomas, J., dissenting) ("The record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence – because, at that time, he had no further evidence to submit – but state funding for his pursuit of more evidence."). Although the Court did not expressly hold that that failure to provide funds itself violated *Ford*, the right to present one's own expert is meaningless without the ability to obtain one. *See* Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert Assistance*, 60 Okla. L. Rev. 283, 303 (2007)[16] (without such a guarantee, "the Court's insistence upon [Panetti's] opportunity to challenge the report of court-appointed experts would ring hollow").

CONCLUSION

The judgment of the court of appeals should be reversed.

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[16] *Available at* http://adams.law.ou.edu/olr/articles/vol60/202drinanarticleblu5.pdf.

Respectfully submitted,

DAVID W. OGDEN
DANIEL S. VOLCHOK
ALEXANDRA STEWART*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
(202) 663-6000
* (Admitted only in Tennessee; supervised by members of the firm)

DEANNE M. OTTAVIANO
NATHALIE F.P. GILFOYLE
AMERICAN PSYCHOLOGICAL
ASSOCIATION
750 First Street, N.E.
Washington, D.C. 20002
(202) 336-5500

Counsel for American Psychological Association

AARON M. PANNER
Counsel of Record
T. DIETRICH HILL*
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@kellogghansen.com)
* (Admitted only in New York; supervised by members of the firm)

Counsel for American Psychiatric Association and American Academy of Psychiatry and the Law

March 6, 2017

RECORD AND BRIEFS

No. 16-5294

FILED
MAR - 6 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND TWENTY-THREE CAPITAL ATTORNEYS AND INVESTIGATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JANET MOORE, *Co-Chair,*
Amicus Committee, National Association for Public Defense
For identification purposes only:
ASSOCIATE PROFESSOR
UNIVERSITY OF CINCINNATI
COLLEGE OF LAW
2540 Clifton Avenue
Cincinnati OH 45221

JO-ANN WALLACE, *President and CEO*
TRAVIS STEARNS, *of Counsel*
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1901 Pennsylvania Avenue, NW, Suite 500
Washington, DC 20006

GEORGE H. KENDALL
Counsel of Record
JENAY NURSE
CORRINE A. IRISH
SQUIRE PATTON BOGGS (US) LLP
30 Rockefeller Plaza
New York, New York 10112
(212) 872-9800
george.kendall@squirepb.com

DAVID OSCAR MARKUS, *Co-Chair,*
Amicus Committee National Association of Criminal Defense Lawyers
40 NW Third Street, PH1
Miami, FL 33128

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INTEREST OF *AMICUS CURIAE*

Undersigned *amici* are lawyers and investigators who were on the ground representing indigent defendants when *Ake v. Oklahoma*, 470 U.S. 68 (1985), was announced. Collectively, we are public defenders, solo practitioners, and investigators who have sought to ensure that indigent clients secure expert assistance necessary for a proper defense. *Amici* believe the reported cases in the first six years after *Ake* was decided fail to fully capture how *Ake*, in conjunction with state law, was applied to death penalty cases. *Amici* were practicing in trial courts where the state was seeking the death penalty and have first-hand experience with *Ake's* application during those years.

This brief is also submitted on behalf of three prominent non-profit legal organizations: the National Association of Criminal Defense Lawyers (NACDL), The National Legal Aid & Defender Association (NLADA), and the National Association of Public Defense (NAPD). NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NADCL is dedicated to advancing the proper, efficient, and just administration of

justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1]

NLADA, founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local level. NLADA serves as a collective voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused, both adults and youth.

NAPD is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to clients in death penalty cases. NAPD's members are the advocates in

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[1] Pursuant to Rule 37, counsel note this brief was not authored by counsel for either party, and neither the parties nor their counsel have made any monetary contributions to the preparation or submission of this brief. The law firm of Squire Patton Boggs (US) LLP undertook the printing and filing of this brief on a pro bono basis. The parties have consented to the filing of this brief.

jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of providing vigorous defense advocacy in all phases of capital litigation. Accordingly, NAPD has a strong interest in the issue raised in this case.

SUMMARY OF THE ARGUMENT

We submit this brief to make three important points. First, *Ake* itself clearly and unambiguously held as a matter of due process that indigent capital defendants must be provided with independent expert assistance upon a reasonable showing of need. The Court was unanimous on this point and swept aside aging precedent that had held provision of neutral assistance was adequate.

Second, *Ake* was hardly a revolutionary decision. As the Court noted, many states already provided expert assistance. In the first six years after *Ake*, numerous states explicitly held independent expert assistance must be provided upon an adequate showing of need.

Third, the full story of the availability of independent expert assistance for indigent capital defendants cannot be fully appreciated from inspection of reported case law. We show that in nearly 20 capitally-active jurisdictions, trial courts

and public defender offices routinely provided for independent expert assistance upon a showing of need. These practices are found in the policies and practice of those defender offices and in often sealed orders of the trial court. They are confirmed by twenty-three distinguished amici who were in the capital trial court trenches in the 1980s and early 1990s.

ARGUMENT

I. *AKE V. OKLAHOMA* CLEARLY ESTABLISHED AN INDIGENT DEFENDANT'S RIGHT TO THE ASSISTANCE OF AN INDEPENDENT MENTAL HEALTH EXPERT AT A CAPITAL SENTENCING PROCEEDING

In *Ake v. Oklahoma*, 470 US 68 (1985), this Court plainly recognized that in the context of capital sentencing, a defendant is entitled to an independent mental health expert upon an adequate showing of need. When discussing the penalty phase of trial in *Ake*, the Court explained it was upholding the practice of permitting psychiatric testimony on the question of future dangerousness where "the defendant has had access to an expert of *his own*." *Ake*, 470 U.S. at 84 (citing *Barefoot v. Estelle*, 463 U.S. 880, 896-905 (1983)) (emphasis added). Acknowledging the importance of the factfinder having both views of the prosecutor's psychiatrists and the "opposing views of the defendant's doctors," *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 899), the Court determined that fair adjudication in capital sentencing proceedings, where the state

presented psychiatric evidence, required that a defendant have access to an independent expert. The Court emphasized that without such assistance there is a risk that the "ultimate sanction" could be "erroneously imposed." *Id.*

This right derives from the Court's evolving recognition of due process and meaningful access to justice for indigent defendants.[2] Fundamental fairness requires that indigent defendants possess the tools necessary to mount an effective defense or appeal. *Ake*, 470 U.S. at 77. The Court has "required that such tools be provided to those defendants who cannot afford to pay for them." *Id.* Depriving indigent defendants of an independent expert to assist in developing a defense or providing meaningful assistance at the capital sentencing hearing, as the court did in *McWilliams v. State*, 640 So. 2d 982 (1991), denies defendants a basic defense tool and is inconsistent with *Ake* and its progeny.

A. *Ake* Unequivocally Requires the Provision of an Independent Expert

In *Ake*, the Court explicitly rejected as inadequate the state trial court's reliance on the decision in

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[2] *See Griffin v. Illinois*, 351 U.S. 12 (1956), entitling indigent defendants to transcripts necessary for appeal; *Burns v. Ohio*, 360 U.S. 252 (1959), holding that indigent defendants are not required to pay a fee before filing a notice of appeal; *Gideon v. Wainwright*, 372 U.S. 335 (1963), entitling indigent defendants to the assistance of counsel at trial; *Douglas v. California*, 372 U.S. 353 (1963) entitling indigent defendants the right to counsel on the first direct appeal as of right; *Strickland v. Washington*, 466 U.S. 668 (1984), establishing defendant's right to effective assistance of counsel at trial; *Evitts v. Lucey*, 469 U.S. 387 (1985), holding that counsel in appellate proceedings must be effective.

United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), where the Court determined that no additional expert assistance was required after a neutral mental health expert examined the defendant. *Ake*, 470 U.S. at 84-85. The Court fundamentally disagreed with the state trial court's reliance on *Smith*, explaining that *Smith* was decided during a period when "indigent defendants in state courts had no constitutional right to even the presence of counsel." *Id.* at 85. The Court recognized that since *Smith*, not only has psychiatry played an enhanced role in criminal law, but there has also been an "increased commitment to assuring meaningful access to the judicial process" and "fundamental fairness today requires a different result." *Id.*

The Court's recognition of the pivotal role of mental health experts to the defense and the adversary process provides further support that the Court contemplated this role to be independent of the prosecution. At capital sentencing, the Court emphasized that the need for meaningful psychiatric testimony is especially relevant to the defense because it provides "an expert's well-informed opposing view" and without such testimony a defendant "loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." Denial of meaningful assistance of an independent expert at capital sentencing is a denial of due process. The Court in *Ake* believed that "due process requires access to a psychiatric examination on relevant issues, to the testimony of a psychiatrist and to the assistance in preparation at the sentencing phase." *Id.* at 84.

Additionally, *Ake* emphasized the role of the psychiatrist as one who will "conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Ake*, 470 U.S. at 82. The consistent theme of the aforementioned responsibilities is the expert's assistance and dedication to the defense. The Court further explained what the assistance of a psychiatrist entailed "gather[ing] facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition may have affected his behavior at the time in question." *Id.* at 80. These important duties cannot be satisfied without independence from the prosecution and allegiance to the defense. A neutral expert cannot effectively aid in mounting a defense. The defendant and defense attorney cannot be completely candid with a neutral expert, without concerns about that expert's split allegiances, conflicts of interest or possible divulgence of damaging information. Consultation with a neutral expert has the potential to undermine the defense and is not the type of expert assistance envisioned by this Court in *Ake*.

Even then-Justice Rehnquist, the sole dissenter in *Ake*, recognized that the holding in *Ake* entitled the defendant to an independent expert. *Ake*, 470 U.S. at 92 (Rehnquist, J, dissenting). In his view, if a defendant is entitled to an expert, it should not be

one who would assist in "evaluation, preparation, and presentation of the defense." *Id.* at 92. He recognized "unfairness" would arise if the only competent witnesses on the question of sanity were hired by the state. *Id.* Instead, he believed that "all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office." *Id.* The bottom line of Justice Rehnquist's dissent was to narrow the role of the expert to the bare minimum to ensure fairness—independence from the prosecution.

B. *Ake's* Requirement of a State Funded Mental Health Expert Reinforced Pre-existing State Practice in Most Jurisdictions

The *Ake* Court recognized that provision of a mental health expert to assist the defense was neither a novel idea nor over burdensome to the state since "[m]ore than 40 states, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise." *Ake*, 470 U.S. at 79. The Court listed statutes and cases going as far back as 1977, where states, including those who enforced the death penalty, entitled indigent defendants to state funded expert assistance in capital and noncapital cases. *Id.* at n.4. Additionally, the Court emphasized that a federal statute already provided for "the assistance of all experts necessary for an adequate defense." *Ake*, 470 U.S. at 79-80 (quoting §18 U.S.C. 3006A (1)(1982)). *Ake* constitutionalized what was already existing federal

and state practice, "these statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80.

II. IN THE INITIAL YEARS AFTER AKE STATE LAW IN NUMEROUS CAPITAL JURISDICTIONS SUPPORTED THE RECOGNITION OF STATE-FUNDED EXPERTS AS INDEPENDENT OF THE STATE

Between 1985, when *Ake* was decided, and 1991, when Petitioner McWilliams' conviction was affirmed, 34 states used capital punishment; the remaining jurisdictions either de facto or by law had no operational death penalty during this time.[3]

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[3] By 1991, the following jurisdictions did not have the death penalty: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Bureau of Justice Statistic Bulletin: Capital Punishment 1991 ("BJS Bulletin 1991"), Dept. of Justice at 1, 5, Oct. 1, 1992, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4066 (last visited Mar. 1, 2017). While Vermont had a death penalty statute in 1985, Vt. Stat. Ann. Tit. 13, § 7101 *et seq.*, it was invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972), and never amended. Therefore, while Vermont is the only state of the above jurisdictions listed that is included in the 1985 BJS Bulletin as a jurisdiction with death penalty law, it effectively did not have the death penalty. *See* Bureau of Justice Statistic Bulletin: Correctional Populations in the United States, 1985 ("BJS Bulletin 1985"), Dept. of Justice, at 106-107, Dec. 1, 1987, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=3695 (last visited Mar. 1, 2017) (reporting Vermont had no prisoners

During this time, courts in a significant number of these states recognized *Ake* required an independent expert.

A. Texas, Florida, and California Law Recognized that State-Funded Defense Experts Must Be Independent

By 1991, Texas had 340 death-sentenced prisoners; Florida had 311 death-sentenced prisoners and California had 301 death sentenced prisoners – combined representing 38% of prisoners sentenced to death in the United States at that time.[4] All three states around the time Mr. McWilliams' conviction was affirmed explicitly required that court-appointed and funded criminal defense experts be independent from the State.

Dating back to 1980, Florida required that "where counsel has reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense" the court

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under sentence of death in 1985). Further, between 1985 and 1991, New Hampshire and South Dakota imposed no death sentences. State-by-State Database, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/new-hampshire-1#sent; http://www.deathpenaltyinfo.org/south-dakota-0#sent (last visited Mar. 1, 2017). The BJS Bulletin 1991 also confirms that these states had no prisoners under sentence of death by yearend 1990 and 1991. *See* BJS Bulletin 1991, at 8; *See also* BJS Bulletin 1985 at 107 (reporting that New Hampshire and South Dakota had no prisoners under sentence of death at yearend 1985); Bureau of Justice Statistic Bulletin: Capital Punishment 1987 ("BJS Bulletin 1987"), Dept. of Justice, at 6, July 1, 1988 (reporting that Vermont, New Hampshire and South Dakota had no prisoners under sentence of death at yearend 1987).

[4] BJS Bulletin 1991, at 1. The total population of death-sentence prisoners was 2482 in 1991. *Id.*

must "appoint one expert to examine the defendant in order to assist counsel in the preparation of the defense" who "shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. Rule 3.216, Insanity at Time of Offense or Probation or Community Control Violation: Notice and Appointment of Experts (eff. July 1, 1980; amended Jan. 1, 2010) (allowing the appointment of additional experts upon motion of the state or defense); *see Rose v. State*, 506 So. 2d 467, 471 (Fla. Dist. Ct. App. 1987) (discussing the one expert for the defense requirement).

In 1951, California recognized that where defense counsel requires a psychiatrist's aid in interpreting defendant's mental condition, the defendant is entitled to a private consultation with that psychiatrist. *In re Ochse*, 238 P.2d 561, 562 (Cal. 1951). In *Ochse*, a psychiatrist retained by the defense was denied a private examination of defendant, who was confined pre-trial because the sheriff overseeing the jail would only allow the examination to be conducted "in the presence of alienists appointed by the court." *Id.* at 561. In granting relief to the defendant, the court reasoned that:

> A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense. Adequate legal

> representation, of course, requires a full disclosure of the facts to counsel, and in order to assure that a client may safely reveal all the facts of his case to his attorney, the law has long recognized the need for secrecy with respect to communications between them.

Id. (internal citations omitted)

Subsequently, in 1975, the California Supreme Court made clear that court-appointed experts must be held to the standard in *Ochse*. In *People v. Lines*, the court held that where a psychotherapist is appointed by the court in a criminal proceeding to examine the defendant in order to provide the defendant's attorney with information, "the results of such examination, including any report thereof, and all information and communications relating thereto, are protected from disclosure by the attorney-client privilege notwithstanding the fact that the defendant has theretofore or thereafter tendered in said proceeding the issue of his mental or emotional condition." 531 P.2d 793, 802-03 (Cal. 1975).

By 1980, Texas recognized that the attorney client privilege attached to "psychiatrists hired by the defense attorney to aid in the preparation of a sanity defense." *Ballew v. State*, 640 S.W.2d 237, 240 (Tex. Crim. App. 1980). Following *Ake*, the Texas Court of Criminal Appeals, in 1993, consistent with "the greater weight of authority", held that when mental health is at issue, the provision of "a single neutral psychiatrist to service both parties" cannot be sufficient to meet the due process minimum of *Ake*. *De Freece v. State*, 848 S.W.2d 150, 158 (Tex. Ct. Crim. App. 1993) (holding that trial court erred in denying appellant's request for the appointment of

a psychiatrist to aid in the preparation and presentation of his insanity defense in the penalty phase). The court in *De Freece* found that:

> In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused was insane at the time of the offense. *Ake* makes this much clear. But even a psychiatrist who ultimately believes the accused was sane can prove invaluable by pointing out contrary indicators and exposing flaws in the diagnoses of State's witnesses.

Id. at 159.

B. Georgia, North Carolina and Virginia Construed *Ake* as Requiring an Independent Expert

Georgia, North Carolina, and Virginia, each active death-sentencing jurisdictions which held

approximately 9% of death sentenced prisoners in 1991,[5] ruled prior to that time that *Ake* required the independent assistance of a court-appointed mental health expert when the need for such an expert had been established.

In *Holloway v. State*, the Georgia Supreme Court reversed the conviction where the defendant had been denied funds for an independent psychiatrist, even though defendant had been examined by a psychiatrist at the state hospital. 361 S.E.2d 794, 795-96 (Ga. 1987). The court held that "Holloway was entitled to the kind of independent psychiatric assistance contemplated in *Ake v. Oklahoma*, *supra*, on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence. Since he was denied this necessary assistance, his conviction must be reversed, and the case remanded for further proceedings." *Id.* at 796; *see also Lindsey v. State*, 330 S.E.2d 563, 566 (Ga. 1985) ("Based on this language from the *Ake* opinion, we conclude that, in addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts").

The North Carolina Supreme Court held in *State v. Moore*, that the trial court erred in failing to give the defendant an independent expert who could not only testify for the defendant, but assist the defendant in evaluating, preparing and presenting a defense. 364 S.E.2d 648, 653-654 (N.C. 1988). The court determined that evaluation by a state forensic psychiatrist for the purposes of determining

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[5] Georgia had 101 prisoners under sentence of death in 1991; North Carolina had 74; and Virginia had 47. BJS Bulletin 1991 at 15.

competency could not satisfy the mandate of *Ake*. *Id.* at 652, 654. In so ruling, the court acknowledged the many ways an independent psychiatrist could have assisted in this defense (a false confession defense):

> A psychiatrist, unlike lay witnesses, could have gathered and analyzed pertinent information about the nature of defendant's confession, and drawn plausible conclusions about its trustworthiness. A psychiatrist also could have impressed upon the jury the frequent plight of the mentally retarded when they become embroiled in a criminal prosecution. . . . Another way in which a psychiatrist might have assisted defendant at trial was by facilitating the preparation and presentation of a renewed motion to suppress defendant's confession on the grounds that he did not knowingly and intelligently waive his constitutional rights.

Id. at 654, 655.

The Virginia Supreme Court, in *Tuggle v. Commonwealth,* reconsidered the defendant's case on remand from the United States Supreme Court in light of *Ake*. 334 S.E.2d 838, 839 (Va. 1985). The defendant in *Tuggle* had been evaluated by two state mental health experts pursuant to a court order to determine whether he was competent to stand trial and whether he was sane at the time of the offense. *Id.* at 840. After the examiners found defendant both competent and sane, the trial court denied the defendant's motion for an examination by a forensic psychologist on the same issues because the defendant had already been examined. *Id.* at 840-841. The Virginia Supreme Court, held that "in light

of *Ake* [] the trial court erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness." *Id.* at 844.[6]

C. Other States With the Death Penalty During This Time Recognized the Independence of Defense Experts

Connecticut, long before this Court's ruling in *Ake*, required that "[w]here the state has access to expert testimony and plans to utilize such testimony, the state should provide an indigent defendant access to an independent expert upon a showing of reasonable necessity by the defendant for such an expert." *State v. Clemons*, 363 A.2d 33, 38 (Conn. 1975); *State v. Gray*, 126 Conn. App. 512, 514 (2011) ("In *State v. Clemons*...our Supreme Court held that an indigent defendant is entitled to the assistance of a state funded expert witness."). The Connecticut Supreme Court also "encourage[d] the necessary expenditure of state funds to provide indigents with an adequate means of presenting reasonable defenses." *Clemons*, 363 A.2d at 38.

In addition, states had a general and longstanding rule, prior to *Ake*, and undisturbed by *Ake's* ruling, that attorney-client privilege applied to mental health experts. *See, e.g., Miller v. District Court*, 737 P.2d 834, 835, 838 (Colo. 1987) (recognizing as "now settled that a psychiatrist retained by defense counsel to assist in the

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[6] The court held that that defendant did not make the requisite "significant factor" showing to entitle the defendant to an independent psychiatrist at the guilt phase. *Tuggle*, 334 S.E.2d at 843.

preparation of the defense is an agent of defense counsel for purposes of the attorney-client privilege.")[7]; *State v. Pratt*, 398 A.2d 421, 423, 424-25 (Md. 1979) ("[I]n criminal causes communications made by a defendant to an expert in order to equip that expert with the necessary information to provide the defendant's attorney with the tools to aid him in giving his client proper legal advice are within the scope of the attorney-client privilege"; privilege is not waived solely by asserting an insanity defense); See also *State v. Kociolek*, 129 A.2d 417 (1957).

III. ON-THE GROUND PRACTICES IN EIGHTEEN THEN-ACTIVE JURISDICTIONS SHOW INDEPENDENT EXPERT ASSISTANCE WAS AVAILABLE UPON A SUFFICIENT DEMONSTRATION OF NEED

For numerous active capital jurisdictions, funding practices for mental health and other necessary experts in capital cases during the first seven years after *Ake* was announced cannot be accurately determined from review only of the usual sources: available trial court and appellate court decisions. In some states, indigents seeking necessary defense funding applied confidentially to public defender offices that had expert-fund budgets. In other states, applications were made *ex parte* to a trial judge and resulting orders would be sealed.

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[7] *See also Hutchinson v. People*, 742 P.2d 875, 880 (Colo. 1987)(ruling that the prosecution's use of a defense expert in its case-in-chief in the absence of waiver or compelling justification violates a criminal defendant's constitutional right to effective assistance of counsel.)

The twenty-three individual *amici* on this brief have extensive experience and knowledge of these practices of three decades ago in states that span eighteen jurisdictions that were prosecuting capital cases in the late 1980s and early 1990's. We submit their declarations that describe these practices. Collectively, their observations show that in eighteen state jurisdictions in the late 1980's and early 1990's, it was understood that once an indigent capital defendant made the necessary showing that a mental health or other expert was necessary to his or her defense at the guilt phase or to prepare mitigation at the penalty phase, *Ake* and often state law required the defendant be provided with expert resources independent of the prosecution.

A. Illinois

During the first seven years after *Ake's* announcement, indigent capital defendants seeking *expert* resources for their defense in Chicago had two avenues to pursue. If their attorney was a staff public defender, the defense would request funding from the office expert fund. App. 22a. But if that fund was exhausted for that year, or if the defendant was represented by an appointed counsel, the request was made to the trial court. The key factor was whether the defense made an adequate showing of need. As *amici* law school Dean Andrea D. Lyon, a former capital trial lawyer during those years, makes clear in her declaration, in those cases "when the court determined we had shown the necessity for particular expert assistance, we always had the authority to retain an independent expert."

App. 23a. By 1990, this was also the practice in capital cases throughout Illinois.[8]

B. New Jersey

New Jersey's post-*Gregg* capital statute became law in 1981 and was repealed in 2007. Throughout the 26 years it was on the books, the state public defender office was responsible to provide adequate defense funding to all indigent cases, whether the client was represented by staff public defenders or private appointed counsel. The judiciary played no role in defense funding issues. App. 73a. *Amici* David A. Ruhnke served both as a staff public defender and appointed counsel and represented 15 capital clients in New Jersey state courts, and is thoroughly familiar with funding policies and practices throughout this time. Ruhnke never had a funding request in a capital case denied, and authorized defense experts would always be independent of the prosecution. This was the practice both before and after *Ake* was announced in all New Jersey capital cases.[9]

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[8] *Amici* Lyon spent the 1980's in Chicago's Public Defender Office trying homicide and capital cases, and was Chief of the Homicide Unit for five years before founding and directing the Illinois Capital Resource Center where she worked on capital case from all over Illinois. See App. 22a. She later was a Clinical Professor of Law at the University of Michigan School of Law, was Director of the Center for Justice in Capital Cases and Associate Dean for Clinical Programs at DePaul University College of Law, and since 2014, serves as Dean of the Valparaiso University Law School. Throughout her four decade career, she has worked on hundreds of capital cases and has written and lectured on all aspects of the capital trial process.

[9] *Amici* Ruhnke is one of the nation's most experienced capital trial attorneys. He has tried 17 capital cases to final resolution before juries, six in New Jersey and eleven in federal

C. Missouri

Both prior to and after *Ake* was announced, Missouri provided funding for independent experts to indigent capital defendants through its public defender system. App. 83a. Whether the attorney was a staff public defender or a private lawyer on contract with the defender office, application for funding would be made to the appropriate regional defender office. *Amici* Sean D. O'Brien, who is a former appointed public defender, reviewed requests for funding for individual experts and if he determined the "expense was reasonably necessary, I would authorize the expenditure." App. 84a. The defense was free to retain independent expert assistance.[10]

D. California

This large state has long operated a hybrid system for the provision of necessary defense funding for indigent capital defendants. Both before and after *Ake* was handed down, public defenders could

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district courts throughout the country. He is a member of the Federal Death Penalty Resource Counsel Project and lectures frequently on capital defense. In both federal and states courts, he has been qualified to testify as an expert witness on the capital defense function. App. 72-73a.

[10] *Amici* O'Brien has worked for or closely with the Missouri Public Defense system for nearly four decades. Throughout this time, he represented scores of persons who were either facing capital charges or who were already condemned to death row. O'Brien left the fulltime practice of law in 2005 when he became a law professor. He is currently a full time tenured professor at the University of Missouri-Kansas City School of Law where he teaches criminal law and procedure and teaches and supervises students in clinics concerning capital post-conviction and actual innocence cases. App. 83a.

seek necessary resources from their office expert fund. All such requests and decisions on these requests were confidential. Any expert retained by the defense would be independent of the prosecution. For private lawyers who had been appointed by the trial court, the process called for counsel to file, on an *ex parte* basis, requests for necessary resources. Again, both the applications and subsequent orders granting funding were sealed. And here too, the experts retained would be independent of the prosecution. As one *amici*, Russell Stetler noted, California death penalty training materials in the 1980s and 1990's "repeatedly stressed" the "capital defense team's right to independent mental health experts in the development and presentation of penalty phase evidence." App. 97a. Stetler was involved in more than two dozen capital cases during the 1980's and early 1990's. Whenever experts were provided in those cases, "these expert consultations were confidential and independent." App. 91a.[11]

Amici California capital trial lawyers Marcia A. Morrissey[12] and James S. Thomson[13] fully agree with

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[11] *Amici* Stetler is one of the most experienced capital case investigators in the United States. Working as a private investigator in the 1980's in California, he worked on cases throughout the state. In the 1990's he became Chief Investigator at the California Appellate Project, a not-for-profit law office that assists post-conviction counsel. From 1995 through 2005, he was the Director of Investigation and Mitigation at the New York Capital Defender Office. In 2005, he returned to California and has served since as the National Mitigation Coordinator for the federal death penalty cases. *Amici* Stetler has published and lectured widely on the investigation of capital cases and has qualified repeatedly in state and federal court as an expert in the investigation of capital cases. App. 90-93a.

[12] *Amici* Morrissey's Los Angeles-based law practice for the past three decades has focused almost entirely on capital cases.

Stetler's assessment that, upon a showing of need, indigent California capital defendants would receive necessary expert assistance that would be independent of the prosecution. App. 59a and App. 45a. Both have handled scores of California capital cases, have applied for expert assistance in those cases, and secured independent experts for their clients. Both affirm these practices and traditions were in place throughout the 1980's and 1990's throughout California.

E. New Mexico

Prior to and after *Ake*, New Mexico has discharged its obligation to provide necessary expert services to indigents in capital cases by yearly appropriations made to and distributed by its public defender system. This system began in 1980, in part a response to capital prosecutions that were brought in the wake of a deadly prison riot. App. 67a. If a capital defendant was represented by a state defender, the request for necessary services was made and acted on within the office confidentially. Private counsel appointed to represent a capital defendant would also seek expert resources from the

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She has been a leader in the capital defense bar, and served in multiple leadership positions in California Attorneys for Criminal Justice. She has taught and consulted on all phases of capital trial representation though much of her career. App. 56-58a.

[13] *Amici* Thomson began representing capital defendants in 1981 from his office in Oakland. Ever since he has represented many indigents charged with capital crimes at trial and in later appeals. He co-founded one of the country's most demanding and intensive capital training programs at Santa Clara University in 1992 and has taught there and elsewhere on all matters pertaining to effective representation in capital cases. App. 44-45a.

public defender. In cases where funding disputes arose, the matter would be heard *ex parte* by a district court judge.

Santa Fe based *amici* Mark H. Donatelli, a noted attorney, was the director of the New Mexico Prison Riot Defense from 1980 to 1983 and was deputized to ensure those charged with crimes received both competent counsel and necessary independent expert assistance. This system continued to operate after *Ake* constitutionalized the "right to funds for expert assistance." App. 68a. Experts retained in these cases were independent of the prosecution.[14]

F. Colorado

In capital cases in the 1980s and 1990's, the provision for necessary expert assistance was the responsibility of the State Public Defender in cases where staff counsel was representing the indigent client. When the indigent was represented by private appointed counsel, funding requests were heard by the Office of Alternate Defense Counsel. App. 76a. *Amici* David D. Wymore, who served as Chief Trial Deputy Public Defender, held the authority for determining expert retention and funding from 1982 through the 1990's. Upon a showing of need, his policy was to retain experts who were both independent and highly trustworthy. App. 76a. The Office of Alternative Defense Counsel sought to provide similar high caliber and independent expert

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[14] *Amici* Donatelli has focused his practice that began in 1976 on the representation of criminal cases and took on his first capital case in 1980. Due to his experience as a litigator and his broad familiarity with all phases of capital trial representation, he has been a member of the Federal Death Penalty Resource Counsel Project since 2007.

assistance in the private counsel cases. App. 76a. Wymore is "unaware of any substantial dispute arising in a capital case in Colorado regarding the provision of independent expert assistance, ..." App. 78a.[15]

G. Arizona

Both before and after *Ake* was announced, Arizona has maintained a duel system for providing necessary expert assistance to indigents facing capital crime. App. 49a. If the defendant was represented by a staff public defender, the defender would confidentially seek expert resources from his or her own office and with available funds would always retain independent experts. Private attorneys representing indigents were required to apply for funds from the trial court and were required to demonstrate funding was reasonably necessary to present a defense at trial. App. 49a. *Amici* Natman Schaye, who began representing capital clients in Arizona in 1984 and continues to do so presently, noted that *Ake* led the state supreme court "to more carefully consider indigent defendants" funding claims. App. 49a. Schaye, who has trained lawyers for capital representation for decades, observed that if private counsel persuaded the trial court to provide funding, appointed counsel

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[15] *Amici* Wymore held various positions in the Colorado Public Defender Office from 1976 through 2004. From 1982 through 2004, he served as Chief Trial Deputy and was directly responsible for approximately 80 capital cases litigated by the office during that time. While at the defender office, none of that office's capital clients were sentenced to death. Wymore believes a very important reason was that office's ability to seek out and retain independent expert assistance on those cases. App. 75-78a.

would retain expert assistance independent of the prosecution both before and after *Ake*.[16]

H. Delaware

Delaware also had a state public defender system in place in 1985 when *Ake* was handed down. App. 42a. If the indigent client was represented by an assistant public defender, application for expert funds would be made within the office and independent experts would be retained. If the client was presented by private counsel, application for resources was made to the trial court, and the defendant had to first demonstrate sufficient need to secure funding. When funding was approved, counsel were free to and did hire experts independent of the prosecution. *Amici* Kevin J. O'Connell, an assistant public defender and former private practitioner has been involved in numerous capital cases since 1989, confirmed trial counsel would retain independent experts.[17]

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[16] *Amici* Schaye has practiced lawyer in Arizona since 1981, and has devoted a large percent of his practice to capital cases. As a private practitioner until 2010, he is deeply versed in the policies and practice of securing adequate resources for capital clients. During his long career, he has served on several committees appointed by the Arizona Supreme Court to improve the defense function in capital cases. App. 47-48a

[17] *Amici* O'Connell has practiced law in Delaware since 1984 and had focused on criminal law. In 1989, as a court-appointed conflicts attorney, he became involved in his first of many state capital cases. As a private lawyer representing indigent defendants facing the death penalty, he sought adequate funding for experts in all of those cases. In 2005, he joined the Offices of Defense Services in Delaware where he continued to represent capital clients. App 42-43a

I. South Carolina

This state directs funding for expert services issues in capital cases to the trial courts. App. 88a. Well before *Ake* was announced, upon an adequate showing of need, trial judges authorized funds for the retention of independent experts and further approved fees in excess of initially low statutory caps. App. 88a. This practice continued after *Ake*. *Amici* David I. Bruck, whose law practice from 1984 to 2004 focused upon representing indigent capital defendants in South Carolina, wrote "it is therefore unsurprising that a search of South Carolina death penalty appellate decisions does not disclose a single case in which a death-sentenced prisoner has relied on or cited *Ake* as authority to reverse the denial of funding for defense expert or investigative services at trial." App. 88a. Given these practices, "the independence of defense mental health experts is an issue that has simply never arisen in South Carolina 89a." Moreover, "as far as I am aware, no South Carolina circuit court has ever required a capital defendant to rely on state-employed or state- allied mental health experts to assess the presence of possible mitigating evidence, ..." App. 89a.[18]

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[18] *Amici* Bruck has specialized in capital litigation for nearly all of his 41 years as an attorney. Twenty four of those years, 1980 – 2004, were devoted to representing indigents in capital cases in South Carolina. During those years, Bruck was invited on several occasion to lecture at state judicial workshops for state judges on death penalty law and procedure. He has taught at several law schools, and since 2004 has been the Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse, a resource center for lawyers representing capital clients in Virginia and elsewhere. App. 86-87a.

J. North Carolina

In the years before and after *Ake*, trial judges heard motions for funds for expert in indigent capital cases. Such resources would be made available, but only after a showing of need. While defendants were not always permitted to choose their experts, " counsel for defendant usually identified the expert to be retained." App. 25a. *Amici* Malcolm Ray Hunter, Jr., who was the State's Appellate Defender from 1985 until 2000, represented a young, intellectually disable man who was denied an independent expert where his mental status was the key issue in the case. In *State v. Moore*, 364 S.E.2d 648 (1988), the court held upon an adequate showing of need, indigent defendants were entitled to independent experts to aid their defense.[19]

K. Florida

In the years after *Ake*, indigent capital defendant seeking *expert* assistance would file funds motions in the trial court. Three experience *amici* – Carey Haughwout, the long-time elected Public Defender in Palm Beach, Bill White, the former elected Public Defender in Jacksonville, and David Fussell, "learned counsel" in capital cases and assistant public defender in Orlando – each confirm that so long as the defense could make an adequate showing of need, the trial court would make funds available

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[19] *Amici* Hunter was North Carolina's Appellate Defender from 1985 until 2000. His office handled all capital direct appeals and other non-capital appeals to the state appellate courts. Beginning in 1989, his office housed the North Carolina Death Penalty Resource Center, which assisted lawyers with capital cases in the trial and post-conviction courts. App. 24-25a.

for the retention of independent expert assistance. As PD Haughwout put it: "since the late 1980's it has been the accepted and expected practice in the defense of capital cases to obtain independent experts to assist the defense in exploring and presenting mental health mitigation in death penalty proceedings." App. 62a. PD White said much the same: "Prior to and . . . since [*Ake*], our office routinely requested, and was granted the appointment of independent defense experts for use at trial and in mitigation in capital cases." App. 41a. And in Orlando, learned counsel Fussell summed up: upon an adequate showing of need, the trial court "would sign an order approving the expert" [and] "the expert was independent of the prosecution and worked solely for the defense."[20] App. 19a.

L. Maryland

This state provides indigent defenses services through the Maryland Office of the Public Defender.

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[20] *Amici* Haughwout joined the Florida Bar in 1983 and has long been qualified to represent capital clients. In 1987-1990 she was assigned to the capital division of the Palm Beach County Defender Office. Both as a public defender and private practitioner, she has represented more than fifty capital defendants. She is presently serving her fifth term as the Public Defender for the Fifteenth Judicial Circuit. *Amici* White joined the Jacksonville public defender office in 1974 and immediately began to work on capital cases. He is a co-founder of Life Over Death, Florida's capital trial training program. During his career, he has handled dozens of capital cases, as both first and second chair and for decades has taught at capital litigation training programs. From 2004 to through 2008, he served as the elected Public Defender of the Fourth Judicial Circuit. *Amici* Fussell has represented indigent capital clients in the Orlando area since 1987 and has handled twenty cases that were charged as capital cases. He has since qualified a "learned counsel" in capital cases in the federal courts.

Before and after *Ake*, the Capital Defense Division supervised all capital litigation in the state. *Amici* Gary Christopher served as the Chief Attorney of this division from early 1984 thought the summer of 1989. App. 63a. *Ake* required no changes in Maryland because "[t]he Agency already had a system in place for the retention and funding of independent expert witness[es]." App. 64a. The Agency had a fund for expert witnesses that was administered by the Chief Public Defender. Christopher recalls "[i]n every case I can recall the Chief Defender deferred to my judgment on the subject of retaining experts for a given case." App. 64a. Upon an adequate showing of need, indigent capital defendants received independent expert assistance.[21]

M. Kentucky

This is another state that had a settled system in place, prior to *Ake*, for indigent capital defendants to secure independent expert assistance so long as the defense could show such services were reasonably necessary. *Amici* Edward C. Monahan, Public Advocate of Kentucky, explained that with the state supreme court's decision in *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984), "Kentucky courts provided funding for the retention of independent expert assistance so long as the defense could make a reasonable showing the expert was necessary . . ." App. 29a. After *Hicks*, the key point of litigation has

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[21] *Amici* Christopher served as head of the Maryland Public Defender system's capital defense unit during the years prior to and after *Ake* was announced. He was a vital decision-maker concerning funding for expert assistance in all capital cases in the state during those years. App. 63-64a.

not been whether the expert needed to be independent, but whether the defense had made a sufficient showing of need. App. 29a. *Ake* confirmed the correctness of this approach.[22]

N. Washington

During the 1980's and early 1990's, appointed counsel in Washington in capital cases were required to seek funds necessary for the defense from the trial court. App. 70a. Before *Ake*, the trial bench sometimes resisted holding these hearing *ex parte*, but if a sufficient showing was made, the defense would receive funding to hire an independent expert. After *Ake*, these requests were heard *ex parte* and the amount of funding increased. App. 70a. *Amici* Kathryn Ross, who handled capital cases in Washington throughout the 1980's and 1990's and met regularly with other capital trial attorneys, wrote "[t]here is no question that in Washington State defendants in capital cases at trial, on sufficient showing of need, were granted funding for independent mental health experts before and after publication of *Ake v. Oklahoma*." App. 71a.[23]

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[22] *Amici* Monahan has spent thirty-seven of the last forty-one years representing indigent clients in Kentucky. While now the Public Advocate for the Commonwealth of Kentucky, from 1980 to 2001, he served as the Director of Education and Development for the Department of Public Advocacy and was keenly aware of the developments in counsel and expert funding issues. He has represented twelve capital clients in trial and appellate courts. App. 27-30a.

[23] *Amici* Ross was admitted to the Washington State Bar in 1976 and has represented persons charged with crime throughout her entire career. In the 1980's she met regularly with other capital defense counsel to keep in touch with legal developments in the capital cases under the auspices of the Washington Association of Criminal Defense Lawyers, and

O. Ohio

Before and after the *Ake* decision, Ohio state law provided that indigent capital defendants would have access to independent expert services upon a showing of adequate need. App. 12a. Prior to *Ake*, indigent defendants would often not make a sufficient showing of necessity to gain such services. But after *Ake*, *amici* S. Adele Shank explains "death penalty defense attorneys regularly relied upon Ohio Rev. Code section 2929.024 when requesting independent expert assistance during the 1980's and early 1990's and the Ohio courts regularly granted such requests."[24] App. 14a.

P. Oregon

In the 1980's and 1990's, the Oregon State Indigent Defense Services agency provided skilled trial counsel for capital cases by contracting with experienced trial counsel to handle these cases. App. 16a. *Amici* Duane McCabe became a contractee in 1989 when he joined up with another contract attorney, Ralph H. Smith, Jr. McCabe continues to serve in this capacity to this day. In the 1980's and 1990's, counsel representing an indigent capital

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twice chaired or co-chaired the Association's death penalty committee. From 2005 to 2015, she was the Director of the Washington Death Penalty Assistance Center. App. 69-71a.

[24] *Amici* S. Adele Shank began her legal career in 1980 as a prosecutor. In 1984, she joined the Ohio Public Defender Office, Death Penalty Section. There she represented indigent capital defendants at trial and throughout the appellate process. She also became Chief Counsel for Trial Assistance and Death Penalty Education. In 1992, she went into private practice and has continued to focus on the representation of capital indigent clients. App. 12-13a.

defendant, to obtain expert funds, "would submit an *ex parte* motion to the court with a showing of the necessity for funding the specific expert." App. 16-17a. When the motion was granted, the attorney could "retain the expert as an agent. . . ." App. 17a. In all of McCabe's and Smith's cases, so long as they made an adequate showing, the court authorized funds, and they would always retain independent experts. This was the standard practice in capital cases in the wake of *Ake*. App. 17a.[25]

Q. Pennsylvania

Philadelphia had a very active death penalty docket during the 1980s and 1990s due to the policy of the then District Attorney to seek the death penalty in nearly all charged aggravated murder cases. The Public Defender was barred from representing capital clients until 1993; individual trial judges kept a list of attorneys in private practice from which to make appointments in capital cases. App. 51a. *Amici* Samuel Stretton represented numerous capital clients in Philadelphia and other Pennsylvania counties in the 1980s and 1990s. Stretton recalled that prior to *Ake*, "most of the trial judges were very tough on funds motions." App. 52a.

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[25] *Amici* McCabe has been an active member of the Oregon Bar since 1974. He is a founding member of the Oregon Criminal Defense Lawyers Association and led an effort to create a subgroup devoted entirely to the defense of capital cases. Nearly all of his practice has concerned criminal defense representation. McCabe established the Public Defender Office in Coos County, Oregon, and later moved to the Deschutes County defender office. He has been a regular instructor at death penalty training seminars. As a contract capital lawyer for nearly three decades, he is familiar with all Oregon policies and practices that concern securing resources for an effective defense. App. 15-16a.

After *Ake*, "the problems I encountered concerned mostly the amount of funding provided for approved expert services." But upon an adequate showing of need, Stretton and other private lawyers obtained services "independent of the prosecution." App. 52a.[26]

R. Tennessee

In both Knoxville and Nashville, indigent capital clients in the 1980s and 1990s were required to seek expert resources from the trial court. In Knoxville, this process would begin with the filing of an *ex parte* motion. App. 9a. If the defense could show both a particularized need and reasonableness, the trial court would grant funds. At that, the defense would be free to hire an independent expert. *Amici* Mark Stephens, who has practiced in Knoxville since the 1980s, followed this very practice while representing Richard Tate on capital murder charges and obtained funds and hired an independent mental health expert. Stephens recalled, when other counsel followed these procedures and made an adequate showing of need, counsel "were routinely able to secure independent expert services during that time period." App. 10a.[27]

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[26] *Amici* Stretton has been an attorney in Pennsylvania since 1973. He has devoted his entire career to representing persons charged with criminal offenses. Through his very active practice in the 1980s and 1990s in Philadelphia, he is aware of the policies and procedures that governed submissions for funding for expert assistance in capital cases. App. 51-52a.

[27] *Amici* Stephens has been the elected Public Defender in Knox County, Tennessee since 1990. Prior to becoming the Public Defender, he was in private practice devoted to indigent defense where he tried capital and other serious felony cases. App. 8-9a.

These same procedures were followed in Nashville during this period in the wake of *Ake*. App. 54a. The public defender office had no funding for experts so requests were made to the trial court. Such requests were made *ex parte* and were filed under seal. *Amici* J. Michael Engle, who practiced in the courts there since 1978, recalled motions "would detail the specific need and its relation to the facts of the case. The proposed expert's credentials would be appended, often with the proposed expert's affidavit as to why their assistance would/could be helpful." App. 54a. In the event the motion was granted, "in capital case, [the] experts were always independent."[28] *Id.*

[28] *Amici* Engle has devoted most of his four-decade career to the defense of indigents in the County of Davidson, Tennessee. For twenty five years, he was a supervisor for felony trials and is certified as a specialist in criminal trial advocacy and meets the standards to serve as lead counsel in capital trial cases. App. 53a.

CONCLUSION

Ake's requirement that appointed defense expert assistance must be independent of the prosecution is clearly established and was so by 1991.

Respectfully submitted,

JANET MOORE, *Co-Chair, Amicus* Committee, National Association for Public Defense
For identification purposes only:
ASSOCIATE PROFESSOR
UNIVERSITY OF CINCINNATI
COLLEGE OF LAW
2540 Clifton Avenue
Cincinnati OH 45221

JO-ANN WALLACE, *President and CEO*
TRAVIS STEARNS, *of Counsel*
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1901 Pennsylvania Avenue, NW, Suite 500
Washington, DC 20006

GEORGE H. KENDALL
Counsel of Record
JENAY NURSE
CORRINE A. IRISH
SQUIRE PATTON BOGGS (US) LLP
30 Rockefeller Plaza
New York, New York 10112
(212) 872-9800
george.kendall@squirepb.com

DAVID OSCAR MARKUS, *Co-Chair, Amicus* Committee
National Association of Criminal Defense Lawyers
40 NW Third Street, PH1
Miami, FL 33128

Counsel for Amicus Curiae

APPENDIX

APPENDIX A — INDEX OF *AMICI*

DAVID I. BRUCK is currently a Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse. Mr. Bruck has specialized in capital litigation for nearly all of his 41 years as an attorney. Twenty-four of those years, 1980-2004, were devoted to representing indigents in capital cases in South Carolina.

GARY CHRISTOPHER is currently a practicing attorney in Maryland. Mr. Christopher served as Chief Attorney of the Capital Defense Division of the Maryland Office of the Public Defender from 1984 through 1989. As Chief Attorney, he was a vital decision-maker concerning funding for expert assistance in all capital cases in the state.

MARK H. DONATELLI is currently a practicing attorney in New Mexico where he represents capital defendants in state and federal court. Mr. Donatelli began representing individuals facing the death penalty in 1980. He served as a public defender from 1980 to 1983. After entering private practice in 1983, Mr. Donatelli continued to assist private attorneys and public defenders with capital cases.

J. MICHAEL ENGLE is currently a practicing lawyer in Nashville, Tennessee who has dedicated most of his four-decade career to defending indigent clients as an attorney in Metropolitan Nashville-Davidson County Public Defender's Office. For twenty-five years he was a supervisor for felony trials in the public defender's office and has tried numerous death penalty cases.

Appendix A

DAVID FUSSELL is currently a practicing attorney in Orlando, Florida. Mr. Fussell has represented individuals in state and federal capital cases since 1989. He was an assistant public defender in the 9th Circuit of Florida (Orange and Osceola counties) from 1987-1990 where he was an attorney in the capital crimes unit. As an attorney in the capital crimes unit, he represented at least 20 individuals charged with crimes where the state sought the death penalty.

CAREY HAUGHWOUT is currently the elected Public Defender of the Fifteenth Judicial Circuit of the State of Florida. She has held that position since January 2001. Ms. Haughwout began representing clients charged with capital crimes in 1986. She worked as an attorney in the capital division of the Palm Beach County Public Defender's Office from 1987-1990 before entering private practice in West Palm Beach. Ms. Haughwout has tried approximately 20 death penalty cases and handled over 50 capital cases in multiple jurisdictions throughout Florida.

MALCOLM RAY HUNTER, JR. is a practicing attorney in North Carolina. Mr. Hunter served as Appellate Defender for the State of North Carolina from 1985 until 2000 where he represented indigent clients convicted of capital and non-capital crimes in state appellate courts. Beginning in 1989, his office housed the North Carolina Death Penalty Resource Center, which assisted lawyers with capital cases in the trial and post-conviction courts.

ANDREA D. LYON is currently the dean of Valparaiso University Law School in Valparaiso, Indiana. Ms. Lyon

has tried hundreds of cases, including numerous capital cases, throughout the state of Illinois. She was the founder and director of the Illinois Capital Resource Center. In the 1980's, Ms. Lyon was an attorney in the Cook County Public Defender's Office in Chicago where she tried homicide and capital cases and served as Chief of their Homicide Task Force.

DUANE MCCABE is a practicing attorney in Oregon and has represented indigent clients charged with crimes since 1974. Mr. McCabe established the Public Defender Office in Coos County, Oregon, and later moved to the Deschutes County defender office. As a contract capital lawyer for the state of Oregon for nearly three decades, he is familiar with all Oregon policies and practices concerning securing resources for an effective defense.

EDWARD C. MONAHAN is currently the Public Advocate of Kentucky. He has spent the last 37 years representing indigent clients charged with crimes at the trial and appellate levels. He has represented twelve clients facing the death penalty. Mr. Monahan served as chair of the Kentucky Department of Public Advocacy's Death Penalty Task Force and Director of Education and Development from 1980 to 2001.

MARCIA A. MORRISSEY is currently a practicing attorney in Los Angeles, California. For the past 30 years, Ms. Morrissey's practice has almost exclusively focused on defending indigent individuals in capital cases, in state and federal court and at the trial and post-conviction stages. Ms. Morrissey has also consulted with attorneys

in over 150 murder cases, on a variety of issues involving competence and sanity.

SEAN D. O'BRIEN is currently a tenured full-time professor at the University of Missouri-Kansas City School of Law where he teaches criminal law and procedure and post-conviction representation clinics involving capital punishment. Mr. O'Brien has represented indigent clients charged with capital crimes in Missouri since 1983. In years immediately after *Ake* was announced he served as the appointed Public Defender in the Sixteenth Judicial Circuit, Jackson County, Missouri where his responsibilities entailed administration of the public defender's budget, including funding for expert witnesses.

KEVIN J. O'CONNELL is currently an assistant public defender in the Delaware Office of the Public Defender where he represents clients charged with capital murder. Since 1989, Mr. O'Connell has represented dozens of indigent individuals on trial, appeal and post-conviction review of capital cases.

KATHRYN ROSS is a practicing attorney in the State of Washington. Since 1978, Ms. Ross has been representing individuals facing the death penalty at trial or in post-conviction proceedings. She also twice chaired or co-chaired the Washington Association of Criminal Defense Lawyers death penalty committee.

DAVID A. RUHNKE is currently a practicing attorney in Montclair, New Jersey and New York City. Since 1983, Mr. Ruhnke's practice has been dedicated to defending

individuals charged with capital murder. Mr. Ruhnke has tried 17 capital murder cases and has represented capital defendants in state and federal appeals, and in state and federal post-conviction proceedings in New Jersey and throughout the country.

NATMAN SCHAYE is currently Senior Trial Counsel for the Arizona Capital Representation Project, a non-profit devoted to vigorously representing individuals facing the death penalty in Arizona. Mr. Schaye has practiced law in Arizona since 1981, focusing almost exclusively on trial, appeal and post-conviction representation of clients in capital cases.

S. ADELE SHANK is currently a practicing attorney in Columbus, Ohio where she handles capital cases at all stages of proceedings. In 1984, she joined the Ohio Public Defender Office, Death Penalty Section. There she represented indigent capital defendants at trial and throughout the appellate process. She also became Chief Counsel for Trial Assistance and Death Penalty Education. In 1992, she went into private practice and has continued to focus on the representation of capital indigent clients.

RUSSELL STETLER is one of the most experienced capital case investigators in the United States. He is currently the National Mitigation Coordinator for federal capital cases. Mr. Stetler worked as a private investigator on capital cases throughout the state of California in the 1980's. In the early1990's, he served as Chief Investigator at the California Appellate Project.

MARK STEPHENS is currently the elected District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee where he maintains a caseload of primarily murder cases and supervises a staff of approximately 60 employees. He has held the position as the District Public Defender since 1990. As District Public Defender, his responsibilities entail administration of the Knox County Community Law Office, including administration of the public defender's budget.

SAMUEL STRETTON is currently a practicing attorney in West Chester, Pennsylvania. For 35 years he has represented indigent clients charged with serious crimes. During the 1980's and through the 1990's he represented more than two-dozen indigent defendants charged with capital crimes in Philadelphia.

JAMES S. THOMPSON is currently a practicing attorney in Berkeley, California. Mr. Thompson has represented indigent clients charged with capital crimes in California since 1981, and is the co-founder of the Bryan R. Schechmeister Death Penalty College at Santa Clara University. Mr. Thomson is familiar with court rules, statutes and state and federal case law that govern the provision of funds for both capital and non-capital cases in California.

BILL WHITE is a retired attorney in Florida. Mr. White was the elected Public Defender for the Fourth Judicial Circuit of Florida from 2004 to 2008. Mr. White began representing clients in capital cases in 1976. Before his retirement, he represented dozens of individuals in capital

cases at the trial and appellate level and supervised senior assistant public defenders in countless capital cases.

DAVID D. WYMORE is currently a practicing attorney in Boulder, Colorado. Mr. Wymore held various positions in the Colorado Public Defender Office from 1976 through 2004. From 1982 through 2004, he served as Chief Trial Deputy and was directly responsible for approximately 80 capital cases litigated by the office during that time. Among other distinctions, Mr. Wymore is chiefly credited with developing a system of capital jury selection widely known at the Colorado Method of Capital Voir Dire.

APPENDIX B — DECLARATION OF MARK STEPHENS, DATED MARCH 2, 2017

STATE OF TENNESSEE
COUNTY OF KNOX

DECLARATION OF MARK STEPHENS

The affiant, Mark Stephens, after being duly sworn as required by law, does hereby make oath and affirm that the following is a true and correct representation to the best of my knowledge and belief:

1. That I am the elected District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee, having been elected to that position on September 1, 1990. I was re-elected on September 1, 1998, September 1, 2006 and again on September 1, 2014. My current business address is 1101 Liberty Street, Knoxville, Tennessee 37919.

2. That my responsibilities as the elected District Public Defender include administration of the Knox County Public Defender's Community Law Office and the budget that goes with the office. The Knox County Public Defender's Community Law Office has approximately 60 individuals working in the office and handles approximately Ten Thousand (10,000) cases each year.

3. In addition to my management role at the CLO, I maintain a reduced caseload – mainly murder cases.

4. I was in private practice for nearly ten years prior to becoming District Public Defender in 1990. In 1990, I was aware of the rules governing capital litigation in the Criminal Courts of Knox County as well as the general and customary practice and procedures in capital cases in Knox County.

5. Access to funding for court appointed counsel representing indigent defendants is governed by Rule 13 of the Tennessee Supreme Court Rules. Funding for investigative or expert services in capital cases is further governed by Tenn. Code Ann. s. 40-14-207. See, e.g., *State v. O'Guinn,* 709 S.W.2d 561, 568 (Tenn. 1986) ("This statute permits a court in a capital case, when in its discretion it determines that expert, investigative or other similar services are necessary to protect the constitutional rights of an indigent defendant, to authorize these services at state expense"). Both rule and statute allow appointed counsel to request funding by means of an *ex parte* hearing, at which counsel must show a particularized need for the requested funding and the reasonableness of the requested funding. Both rule and statute were in effect prior to August 1990. Thus, as of August 1990, funding for independent expert services was available, through ex parte request, for appointed counsel in capital cases.

6. On August 2, 1990 I was elected to the position of District Public Defender for the Sixth Judicial District. I was sworn in on September 1, 1990.

7. In August 1990, prior to my swearing in, Judge Randall E. Nichols appointed me to serve as co-counsel

to the Hon. Brandt Davis in the case of *State of Tennessee v. Richard Tate* (Knox County Criminal Court Docket #40351 and #40352). This case was handled consistent with Rule 13. Mr. Tate was charged with first degree murder and the state was seeking the death penalty. In Mr. Tate's case, funding was authorized to secure the services of an independent mental health expert- effective August 20, 1990.

8. While Richard Tate is a specific example given to illustrate that funding was available in 1990-91 for independent mental health experts in capital indigent cases under *Ake v. Oklahoma*, it is simply typical of cases where public defenders and private appointed counsel were routinely able to secure independent expert funding during that time period.

Signed this 2nd day of March, 2017.

/s/_____
MARK E. STEPHENS

APPENDIX C — DECLARATION OF S. ADELE SHANK, DATED MARCH 2, 2017

DECLARATION

1. I S. Adele Shank, am an attorney licensed to practice law in the State of Ohio and have been so licensed since November 17. 1980.

2. The primary focus of my legal work has been criminal law. I was a legal intern with the Union County. Ohio. Prosecuting Attorney's Office and, upon admission to the Ohio bar, was hired as an assistant prosecuting attorney. In 1982. I went to Tanzania, East Africa. While there I taught courses in evidence, torts, and civil procedure at the University of Dar es Salaam. I returned to Ohio and in March 1984. I joined the Ohio Public Defender Office, Death Penalty Section, where I handled death penalty trials. Appeals, post-conviction proceedings, and clemency for more than eight years. While at the Ohio Public Defender's Office I became Chief Counsel for Trial Assistance and Death Penalty Education. In that position I provided assistance to lawyers throughout the state who were handling death penalty trials. I also helped to design and implement training programs to certify defense counsel for appointment in capital cases. After leaving the Ohio Public Defender's Office. I went into private practice where I have continued, for over twenty-five years, to handle capital cases at all stages of proceedings.

3. I have been asked to describe based on my personal knowledge and experience, the availability, in Ohio capital cases, during the 1980's and up to 1991, of an independent mental health expert for the investigation and preparation of an insanity defense.

4. Ohio's death penalty sentencing structure was held unconstitutional in *Lockett v. Ohio,* 438 U.S. 586 (1978). A new death penalty sentencing scheme was enacted by the Ohio General Assembly and went into effect on October 19. 1981. Ohio Rev. Code §2929.02-.06.

5. Ohio Rev. Code §2929.024 (Eff. 10-19-81) required that indigent defendants charged with aggravated murder be provided with "reasonably necessary" investigative services and experts, at state expense.

6. The Ohio Supreme Court addressed the parameters of Ohio Rev. Code §2929.024 in *State v. Jenkins,* 15 Ohio St.3d 164, 192-194 (1984) cert. den. 472 U.S. 1032 (1985) rehrg. den. 473 U.S. 927 (1985). Using *Britt v. North Carolina,* 404 U.S. 226 (1971) as guidance, the court held that §2929.024 "requires the court to provide an indigent defendant with expert assistance whenever, in the sound discretion of the court, the services "* * *are reasonably necessary for the proper representation of a defendant charged with aggravated murder * *." 15 Ohio St. 3d at 192-93.

7. The Ohio Supreme Court further held that Jenkins had failed to show that the services of a social

scientist to assist in jury selection were reasonably necessary, and noted that Jenkins request was not comparable to the requests in cases where disputed factual issues were involved and expert assistance was thus necessary. It cited among several examples. *Bush v. McCollum*, 231 F.Supp. 560 (N.D. Tex. 1964), affirmed, 344 F.2d 672 (C.A.5, 1965) which involved "psychological evaluations of defendant where the sanity of the accused was an issue:" 15 Ohio St. 3d at 194.

8. The Ohio Supreme Court again addressed the parameters of Ohio Rev. Code §2929.024 in *State v. Esparza*. 39 Ohio St. 3d 8 (1988) cert. den. 490 U.S. 1012 (1989). Citing *Ake v. Oklahoma*. 470 U.S. 68. 76 (1985), the court said that the services provided for under §2929.024 "are available to the indigent defendant solely for his own purposes in mounting a defense in a capital trial." and held that the statute entitles the defendant to "access to a competent expert, bur does not guarantee such defendant the right to handpick an expert at the state's expense."

9. In *State v. Broom*. 40 Ohio St.3d 277 (1988) cert. den. 490 U.S. 1075 (1989), the Ohio Supreme Court observed that its interpretation of Ohio Rev. Code §2929.024 in *State v. Jenkins*, 15 Ohio St.3d 164 (1984) met the requirements of *Ake v. Oklahoma, Id.* at 283.

10. Ohio Rev. Code §2929.024 (Eff. 10-21-81) and the Ohio Supreme Court's interpretation of it in *State v. Jenkins*. 15 Ohio St.3d 164 (1984) established

the indigent defendant's right to an independent mental health expert in capital cases. Death penalty defense attorneys regularly relied on Ohio Rev. Code §2929.024 When requesting independent expert assistance during the 1980's and early 1990's and the Ohio courts regularly granted such requests.

I declare under penalty of perjury that based on my personal knowledge and experience, the foregoing is true and correct.

Executed on: March 2, 2017

/s/ _____

S. ADELE SHANK (OH 0022148)
LAW OFFICE OF S. ADELE SHANK
3380 Tremont Road, Suite 270
Columbus, OH 43221-2112
(614) 326-1217

APPENDIX D — DECLARATION OF DUANE MCCABE, DATED MARCH 2, 2017

DECLARATION

My name is Duane McCabe. I am a an active member of the Oregon State Bar and I have been so since 1974. In addition to membership in the Oregon Bar Association, I am a bar member of the United States District Court for the State of Oregon, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. For a period of time I was also an active member of the Idaho State Bar and practiced in the United States District Court for the State of Idaho. I am a founding board member of the Oregon Criminal Defense Lawyers Association (OCDLA). I also headed the movement to create a specialized subgroup of the Oregon Criminal Defense Lawyers Association devoted entirely to death penalty defense (Capital Defender section). I further led successful efforts to obtain funding for a death penalty resource counsel in Oregon. I have spoken several times at death penalty training seminars offered by the Capital Defender section of OCOLA. With rare exception I have attended national training sessions on how to provide a constitutionally mandated defense of those charged with capital offenses on a yearly basis.

Almost my entire practice has been devoted to the representation of indigent defendants charged with crime. I established the Public Defender Office for Coos County Oregon and while director I was assigned my first two death penalty cases. After moving to the Deschutes

Appendix D

County defender office I continued to represent indigent clients charged with capital offenses. At that time the Oregon State Indigent Defense Services agency began contracting with select attorneys throughout the state to provide full time statewide representation to indigent capital defendants. In 1989 I joined Ralph H. Smith, Jr, the first contract attorney (now deceased) on a full time contact with the Oregon State Indigent Defense Services agency to provide representation to indigent defendants charged with capital offenses. My contract has continued to this day.

Oregon's history with the death penalty is one of start and stop; the death penalty was reinstated by voter initiative in 1978, ruled unconstitutional in 1981 by the Oregon Supreme Court, and reinstated by voter initiative in 1984. I am familiar with the history and necessity of expert services to indigents in capital cases in Oregon in the 1980's and 1990's In any capital trial-level case, appointed counsel had the responsibility to fully investigate the case for guilt-phase defenses, to challenge the prosecution's case for the death penalty, and to develop mitigating evidence and a case for a life sentence. In every capital case, effective representation requires that counsel have access to independent expert assistance. They might be investigators, or mental health professionals, or forensic experts, or a combination of these experts.

In Oregon during the 1980's and 1990's once counsel had determined there was a need for expert assistance, he or she would submit an *ex parte* motion to the court

with a showing of the necessity for funding of the specific expert. Once the *ex parte* Order was granted, it allowed the attorney to retain the expert as an agent and further directed the specific funding source, county and/or state, to make payment upon submission of an invoice. In all of the cases I personally handled and those of my partner, Ralph H. Smith, Jr., of which I was aware such requests were granted by the courts. This was the statewide practice prior to and after *Ake v. Oklahoma*, 470 U.S. 68 (1985) through the 1990's. In Oregon during this period of time it is my understanding and belief that if funding was denied it was because the attorney failed to make an adequate showing of need for a particular expert.

I affirm that the foregoing is accurate and true.

/s/_____

Duane J. McCabe
Dated March 2, 2017

APPENDIX E — DECLARATION OF DAVID FUSSELL, DATED MARCH 2, 2017

DECLARATION

I, David Fussell, make oath and say that the following content is true and correct to the best for my knowledge, information and belief:

1. I am an attorney, admitted to practice in Florida. I have continuously been a member in good standing of The Florida Bar since admission. I am a Florida Bar, Board Certified Criminal Trial Specialist and have been for more than 20 years. I meet the criteria for both lead counsel and second chair in Florida capital cases pursuant to Rule 3.112, Florida Rules of Criminal Procedure. I have met lead counsel since the rule was first created several years ago. I am also a member of the United States District Court for the Middle District of Florida and have been so in good standing continuously since approximately 1991. I also meet the standards for Learned Counsel in the federal court system. I practice primarily in the area of criminal law, in both state and federal courts, mainly within Florida.

2. I was an assistant public defender in the 9th Circuit of Florida (Orange and Osceola counties) from 1987 through 1990. One of my positions while an assistant public defender was as a member of the unit which handled capital crimes. As such my responsibilities included representing clients charged in potential

death penalty cases. I have represented at least 20 individuals accused of First Degree Murder for which the state was originally seeking the death penalty. Of those I tried at least 3 which resulted in guilty verdicts and continued on to penalty phase.

3. I have been appointed to represent individuals eligible to receive the death penalty in the federal system. I have served in the role of both guilt phase and penalty phase counsel (Learned Counsel) in federal prosecutions. I have served as Learned Counsel in two death eligible cases prosecuted in the United States District Court for the Middle District of Florida. After extensive preparation, the government, due to mitigation was dissuaded from seeking death for my federal clients.

4. The state of Florida, for as long as I can remember, has had a formal process to obtain assistance of mental health experts in all criminal cases, in regards to competency and insanity. In regards to the need for mental health professionals sought by the defense for other purposes, for example testing, diagnosis and testimony concerning mitigating circumstances in death cases, the process was to file a motion with the trial court. If the trial court determined the defense had demonstrated appropriate need, the court would sign an order approving the expert. At the time, the county was responsible for paying costs of litigation including expert costs. The expert was independent of the prosecution and worked solely for the defense.

5. I used the above process since I first began representing individuals in capital cases in approximately 1989 until subsequently, when the state became responsible for payment of expert costs for indigent defendants.

And, further, I say not.

March 2, 2017

/s/ _____

David Fussell
Fussell Law Firm, P.A.
650 E. Robinson Street
Orlando, Florida 32801

APPENDIX F — DECLARATION OF ANDREA D. LYON, DATED MARCH 1, 2017

DECLARATION

My name is Andrea D. Lyon. I have been a lawyer since 1976. I am a member of the Bar of the State of Illinois, the District of Columbia and the State of Michigan. I am also a member of the Bar of the Supreme Court of Illinois, of the United States District Court in the Southern District of Illinois, the United States District Court for the Seventh Circuit, and the Supreme Court of the United States.

For much of my career, I have represented indigent citizens charged with crime. I currently am the dean of the Valparaiso University Law School. Before taking this position in 2014, I was a Clinical Professor of Law, Director of the Center for Justice in Capital Cases and Associate Dean for Clinical Programs at DePaul University College of Law. Before joining the DePaul faculty, I was an Assistant Clinical Professor of Law at the University of Michigan Law School for five years from 1995 to 2000. Before that, I was the founder and director of the Illinois Capital Resource Center (ICRC) for five and a half years. ICRC was established by the Illinois Supreme Court to respond to the need for post-conviction and habeas corpus counsel for Illinois prisoners who had been sentenced to death, but whose legal procedures had not yet been exhausted. Before holding that position, I was a member of the Cook County Public Defender's Office in Chicago, spending most of my thirteen and a half years there as a member of (and ultimately Chief of)

the Homicide Task Force. I have tried hundreds of cases, written nearly a hundred appeals and habeas petitions, and have trained hundreds of defense attorneys at various CLE programs throughout the country, including the National Criminal Defense College in Macon Georgia. Shortly after graduating from law school, I became a staff attorney at the Office of the Public Defender in Chicago.

Throughout my career as a trial attorney, I have represented scores of individuals charged with capital crime. I have consulted on many other capital cases, in Illinois and throughout the country. I have taught a broad array of topics at capital litigation training programs in Illinois and throughout the country. I have published in this area as well.

One of the most important challenges a capital trial lawyer faces representing an indigent client is obtaining sufficient resources to properly investigate the case and present defenses. In the years leading up to *Ake v. Oklahoma* (1985) and in the seven years after its announcement, in Chicago, public defenders would seek funds from our office. If trial counsel made a showing that particular expert services were necessary for either the defense at the guilt phase or for mitigation or to confront the prosecution's case in aggravation, the defender office would make available funds for the retention such services. In those instances, experts were always independent of the prosecution. In complex cases that required multiple experts, or if the defender office expert fund was depleted, we would present funds motions to the trial court. While there were disputes about whether we could make these

presentations *ex parte*, (some judges would allow it, others would not), or whether we had made a sufficient showing to obtain expert assistance, when the court determined we had shown the necessity for particular expert assistance, we always had the authority to retain an independent expert.

In my years at the Resource Center, I became familiar with funding practices throughout Illinois in the wake of *Ake*. Throughout the state, if and when an indigent capital defense made out a sufficient case that a particular type of expert assistance was necessary, overwhelmingly, the court would provide funds for the retention of an independent expert.

I hereby declare that the foregoing is true and correct.

Dated this 1st day of March, 2017.

/s/

APPENDIX G — DECLARATION OF MALCOLM RAY HUNTER, JR., DATED MARCH 1, 2017

Declaration of Malcolm Ray Hunter, Jr.

1. I am attorney licensed to practice law in the state courts of North Carolina as well as the Fourth Circuit Court of Appeals and United States Supreme Court.

2. I served as the Appellate Defender for the state of North Carolina from 1985 until 2000. The primary mission of the Office of the Appellate Defender was to represent indigent defendants convicted of capital and non-capital crimes in the state appellate courts.

3. In 1989, the Death Penalty Resource Center was established and it was placed in the Office of the Appellate Defender and the Appellate Defender appointed and supervised the Director of the Death Penalty Resource Center. The Death Penalty Resource Center was created to assist attorneys appointed to represent indigent capital defendants at trial and in post conviction.

4. The right of indigent defendants to experts as part of representation was recognized by state law prior to *Ake v. Oklahoma*. North Carolina General Statute 7A-450(a) entitled indigent defendants not only to counsel, but also "other necessary expenses of representation.

5. During the period from 1985 until 2000, counsel applied to the trial court for funds for experts. Upon a showing that an expert was necessary, the court would authorize funds or otherwise make an expert available for the defendant's case. Just as with appointed counsel, defendants did not have a "right" to a particular expert of his choice, but in practice, counsel for defendant usually identified the expert to be retained. In any event, the expert was understood as independent of the state.

6. Beginning in 1987, as appellate defender, I represented Billy Moore, a young man convicted of sexual assault based mainly on his confession to police. Mr. Moore suffered from mental retardation and there was a significant question as to whether his confession was voluntary and accurate. Mr. Moore had been examined by a state psychiatrist concerning his competency to stand trial at a state forensic unit. The forensic psychiatrist examined the defendant and found the defendant competent to stand trial. The defendant moved pretrial for an independent psychiatrist to assist counsel. When this motion was denied, the defendant called the state forensic psychiatrist, who gave testimony favorable to the defendant at the motion to suppress and the trial, but defendant lost the motion to suppress and was convicted as charged. On appeal, the Court held that the trial court erred in failing to give the defendant an independent expert who could not only testify for the defendant, but assist the defendant in evaluating, preparing and presenting a defense. *State v. Moore*, 321 N.C. 327, 364 S.E. 2d 648 (1998)

7. Thus, at least after *Moore*, it was clear in North Carolina that the right to an expert included not just access to testimony, but an expert who was a member of the defense team.

This the 1st day of March, 2017

/s/ _____
Malcolm Ray Hunter, Jr.

APPENDIX H — DECLARATION OF EDWARD C. MONAHAN AND EXHIBITS, DATED MARCH 1, 2017

Declaration of Edward C. Monahan,

Public Advocate, Commonwealth of Kentucky

1. I am the chief public defender for Kentucky's statewide public defender program, the Kentucky Department of Public Advocacy (hereinafter, DPA). I am duly licensed to practice before state and federal courts in the Commonwealth of Kentucky, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. I have spent thirty-seven of the last forty-one years representing indigent clients accused of crimes or otherwise facing incarceration on both the trial and appellate levels. During that time, I have represented clients facing the death penalty on twelve occasions. I served as the chair of the DPA's Death Penalty Task Force.

2. In addition to representing clients, I served as DPA's Director of Education and Development for twenty-one years, from 1980 to 2001. This placed me in a position to know the status of many legal developments in the criminal justice community in Kentucky during that time, including the evolving awareness of the need to provide funds to defense counsel for the employment of independent defense experts when a proper *ex parte* showing of reasonable need was made to the court. Kentucky, along with numerous other states, developed a process remarkably similar to that eventually required in *Ake v. Oklahoma*, 470 U.S. 68 (1985). What follows is a broad description of that development.

3. At the time *Ake* was decided, the Kentucky Public Defender System already had a system in place for funding independent expert defense witness and other necessary expenses as the result of Kentucky Revised Statutes (KRS) Chapter 31, the enabling legislation which created DPA in 1974. KRS 31.110(1) provided that a needy person charged with a serious crime was entitled:

> a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
>
> b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

KRS 31.185 provided:

> Any defending attorney operating under the conditions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

This was the statute which the courts interpreted to require funding for independent defense experts such as psychologists.

4. In 1979, the Kentucky Supreme Court decided *Young v. Commonwealth*, 585 S.W.2d 378 (Ky. 1979), which held that the authorization of funds under KRS 31.185 had to take place prior to the procurement of the defense expert services. An Office of Attorney General Opinion dated 1980 concluded that:

> As relates to psychological examinations, KRS 31.185 applies. Where the defense attorney considered the use of state facilities as being impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county. *Young v. Commonwealth*, 585 S.W.2d 378 (1979). *(See* OAG 80-401.)

5. In 1984, in *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984), the court interpreted the word "necessary" in KRS 311.110(1) to require a "reasonably necessary" showing of the need for an independent defense expert.

6. In the wake of *Hicks*, Kentucky courts provided funding for the retention of independent expert assistance so long as the defense could make a reasonable showing the expert was necessary to a defense at trial or for mitigation at the penalty phase of a capital trial.

7. Thereafter, the primary issue that would rise for appellate review was whether the defense had made an adequate showing for those services. For instance, in 1987, in *Smith v. Commonwealth*, 734 S.W.2d 437 (Ky. 1987), the court decided that the defendant had not made an adequate showing. The court reached that decision again

in 1988 in *Simmons v. Commonwealth,* 746 S.W.2d 393 (Ky. 1988). In both *Smith* and *Simmons,* the defense right to the funding was not at issue.

8. In 1985, the United States Supreme Court decided *Ake v. Oklahoma,* and cited KRS 31.070, KRS 31.110, KRS 31.185, and over forty other state statutes and court opinions, in support of its decision. *See Ake,* 470 U.S. at 79 n. 4, 105 S.Ct. at 1094 n. 4. The court perceived its decision to be an adoption of several practices already in effect.

9. Once *Ake v. Oklahoma* was decided, DPA training incorporated the decision in an ongoing effort to teach criminal defense attorneys how to make an adequate showing of the reasonable necessity for funds for independent experts. The training reflected our understanding of the state of development of the issue at the time. We were teaching:

- *Ake v. Oklahoma,* 470 U.S. 68 (1985) established a U.S. constitutional due process right to funding for an independent defense expert when necessary;

- The need to make the motion *ex parte;*

- How to make a threshold showing that a defense expert would be reasonably necessary to the defense;

- How to demonstrate that a state expert or "neutral" expert would not be sufficient. (Note the training materials attached. These are letters from state

experts attesting to the fact that they could not serve as defense experts.)

I made essentially the same points in an article entitled, "Obtaining Funds for Experts in Indigent Cases," which was published in the magazine of the National Association of Criminal Defense Lawyers, *The Champion. (See, The Champion,* National Association of Criminal Defense Lawyers, August 1989, pp. 10-18.)

10. In 1992, in *Sommers v. Commonwealth,* 843 S.W.2d 879 (Ky. 1992), the court found that the defense counsel had demonstrated the reasonable necessity of funds and declared the failure to grant such funds to be prejudicial error, requiring reversal. The defendant Sommers had been indicted in 1988 for the killing by suffocation of his two daughters and the subsequent arson of the home. The central issue of the case was whether death had occurred prior to the arson and not because of it. There were no eyewitnesses to any of the events alleged by the Commonwealth, and the Commonwealth's case was comprised almost entirely by six expert witnesses for the prosecution. This was trial by expert, and the Commonwealth was seeking the death penalty.

11. After reviewing a lengthy pretrial hearing by the trial court, the Kentucky Supreme Court ruled that the defense in *Sommers* had made an adequate showing of reasonable necessity by establishing the following:

- Defense experts were necessary to interpret the technical language of the prosecution reports, to

explain the findings, to look for inconsistencies in them, and to analyze possible flaws in methodology;

- Defense experts were necessary to explore the possibility that the circumstances might well have been consistent with accidental death;

- State and prosecution witnesses were unable to offer confidential consulting services to the defense. (The defense established this by the proffer of affidavits from both the State Fire Marshal and the Chief Legal Officer of the Kentucky State Police.)

12. The Kentucky Supreme Court ruled that:

> To us, it is clear from the record that the defense demonstrated "reasonable necessity," and was entitled to the assistance of an independent pathologist and an independent arson expert or the equivalent. We hold that denial of the motion to authorize funds to provide such assistance constituted prejudicial error. *(Sommers,* at 885.)

13. In 1994, the Kentucky Supreme Court heard a case based on events which had occurred in 1990. *Hunter v. Commonwealth,* 869 S.W.2d 719 (Ky. 1994) involved another case of alleged murder and arson, and the trial court had sentenced the defendant, James D. Hunter, to death. The central question on appeal was whether the trial court had committed abuse of discretion by refusing to grant a continuance to the defense in order to secure

the services of an independent psychiatrist to evaluate the defendant.

14. After witnessing a steady decline in the nineteen year old defendant's mental and emotional state, the defense moved the court for a competency examination, and the court ordered the defendant to be examined by a state psychologist employed by the Kentucky Correctional Psychiatric Center (hereinafter, KCPC). The court also ordered KCPC to include information regarding the availability of legal defenses or mitigating factors based upon the defendant's state of mental health. The subsequent KCPC report declared the defendant competent to stand trial, but did not address any issues of mental capacity. The KCPC psychologist, however, did personally contact the defense to express his concerns regarding the defendant's possible mental deterioration. The defense moved the court for funds for an independent expert to explore possible defenses and mitigation evidence, and a continuance in order to employ the expert. The court denied the continuance. The defense renewed the motion for funds and a continuance after the guilty verdict in March 1991, in order to prepare for sentencing. The court denied the motion again.

15. In its analysis of events, the Kentucky Supreme Court applied *Ake v. Oklahoma* and followed its reasoning carefully. It ruled that the defense was entitled not only to the funds *for,* and services of, an independent defense expert, but that that right also entailed a right to the *time* necessary to procure and use those services as well. The trial court's refusal to grant a continuance was ruled an

abuse of discretion under Kentucky law, and a denial of the Fourteenth Amendment to the United States Constitution right to due process.

16. In summary, Kentucky, like very many other states, had already established a right to funds for independent expert assistance for indigent defendants when reasonably necessary, before *Ake v. Oklahoma* held that the Due Process Clause of the Fourteenth Amendment requires that same right, pointing to states such as Kentucky for support of the ruling.

March 1, 2017

/s/_____
Edward C. Monahan

Appendix H

THE SECRETARY FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
FRANKFORT 40601

March 27, 1986

Edward C. Monahan
Assistant Public Advocate
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Dear Mr. Monahan:

You have requested the Cabinet for Human Resources to assist in the preparation of a defense based on insanity or diminished responsibility on behalf of Kevin Fitzgerald, a defendant in a capital case. The Cabinet for Human Resources maintains a forensic psychiatric facility through which we provide competency evaluations of criminal defendants on request of Judges throughout the Commonwealth, and in which convicted prisoners are treated for mental illness. It has been a long time policy of the Cabinet to decline requests to serve as experts in the preparation of criminal cases either for the prosecution or the defense. We must adhere to that position for several reasons. We regard the protection of our objective stance as necessary to maintain our credibility and integrity when serving as a resource to the courts in competency determinations and prevent circumstances in which our professional staff may be pitted against each other as adversaries.

Appendix H

I am sorry that I must decline your request for our assistance and wish you well in your search for professional assistance.

Sincerely

/s/_____
E. Austin, Jr.
Secretary

Appendix H

THE SECRETARY FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
FRANKFORT 40601

May 19, 1980

Mr. Edward C. Monahan
Assistant Public Advocate
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Dear Mr. Monahan:

This is in reply to your letter dated May 14, 1980 in which you ask whether this Department or any other state agency has medical and mental health professionals "who can appropriately assist the defense in the investigation of matters relevant to the defense." You state that you are not looking for professionals who are aligned with the prosecution or the courts.

This Department maintains the Grauman Forensic Psychiatry Unit on the grounds of Central State Hospital in Louisville, Kentucky, to assist courts in the evaluation of criminal defendants for both the competency to stand trial (KRS 504.040) and for the determination of existence of mental disease or defect at the time of the alleged criminal act (RRS 504.020, .030 and .050). These evaluations are provided pursuant to court order and are supplied as a service to the court, and not to either the prosecution or the defense.

Appendix H

After checking with both my program and legal staffs, I have determined that this Department will not be able to assist you with your request. To do so, in this instance, could compromise the integrity of our program to provide effective evaluations to the courts of Kentucky. If in this or any other case you desire such an objective evaluation, please contact the staff of the Forensic Unit, 2108 Lakeland Road, Louisville, Kentucky 40223 (502-245-9738).

To reiterate, this department cannot allow itself to be used as the tool for either side in criminal matters but must maintain an objective stance. Thank you for your inquiry into this matter. Please feel free to contact me if you have any further questions.

Most sincerely,

/s/
W. Grady Stubo, M.D.
Secretary

APPENDIX I — DECLARATION OF BILL WHITE, DATED MARCH 1, 2017

DECLARATION OF BILL WHITE

For clarity, my given name is William Pierce White, III. When I was elected in 2004 to serve as Public Defender for the Fourth Judicial Circuit of Florida, I petitioned the Supreme Court of Florida to change my name for purposes of signing legal documents to the name I used during my campaign, Bill White. In 2008, I was defeated in a bid for reelection as Public Defender. Although not actively practicing, I remain a member in good standing of the Florida Bar.

I joined the Office of the Public Defender for the Fourth Judicial Circuit in July of 1974, after completing an externship there from the University of Florida College of Law. During that internship, I began working with other attorneys in that office on the appeal and post-conviction pleadings in *Dobbert v. State* involving a client sentenced to death for the murders of two of his children. As an assistant public defender, I continued to work on the Dobbert case, and in July of 1976, upon being named Chief Assistant Public Defender, I wrote the petition for writ of certiorari to the Supreme Court of the United States in that case. The writ was granted, and after writing the briefs for the appellant, I appeared in that losing effort with Lou Frost, the Public Defender, at the oral arguments in that case before the Court.

Beginning in early 1976, I was assigned to handle capital cases. Turnover in our office was such that over 95% of the staff present when I arrived was gone by this time, and I was woefully inadequate to the task. My

inexperience was masked by winning a number of jury trials, but inevitably, a client was sentenced to death. We preserved a *Tedder* issue before *Tedder* was decided, and the client returned and received a life sentence.

I was, with Lou Frost one of the founders of the Life Over Death capital trial trial training program developed for the Florida Public Defender Association, and was a presenter at several of the first sessions of that program.

I have handled dozens of capital cases as first and second chair, and as Chief Assistant Public Defender, and later the elected Public Defender, I supervised senior assistant public defenders in handling dozens more. I have argued appeals at the Circuit, District Court of Appeals, and Supreme Court of Florida levels.

I taught for over fifteen years at the Prosecutor/Public Defender Program at the University of Florida College of Law. As a visiting adjunct, I taught trial practice programs at Nova University College of Law, Florida State University College of Law, and judged mock trials and appellate practice a t the University of Florida College of Law.

I served on the Supreme Court of Florida Death Penalty Study Commission that developed Rule 3.850, of the Florida Rules of Criminal Procedure, and both served on and chaired the Criminal Procedure Rules Committee of the Supreme Court of Florida. I also both served on and chaired the Executive Council of the Criminal Law Section of the Florida Bar. I served on and chaired several committees of the Jacksonville Bar Association, including the Criminal Law Committee.

Appendix I

I was a recipient of the NLADA Outstanding Service Award, and the Florida Public Defender Association Outstanding Service Award (since renamed the Craig Stewart Barnard Award).

During my tenure as elected Public Defender, I served as the Legislative Chair, and in my final year, as President of the Florida Public Defender Association.

I am fully aware of the holding in *Ake v. Oklahoma*, (1985). Prior to and for some time since that holding, our office routinely requested, and was granted the appointment of independent defense experts for use at trial and in mitigation in capital cases. Florida finally established a "Due Process" budget entity for Public Defenders. That fund obviated the need to seek approval from the courts for experts. The elected Public Defender would review requests, but it has long been common practice throughout the Florida trial jurisdictions with which I am familiar for the elected officials or their designees to grant them.

I have read the forgoing and it is a true and correct statement of the facts contained therein. Done this 1st day of March 2017.

/s/_____

BILL WHITE
1307 4th Street
Neptune Beach FL 32266
(904) 502-2141
Florida Bar No: 0188706

APPENDIX J — DECLARATION OF KEVIN J. O'CONNELL, DATED MARCH 1, 2017

Declaration of Kevin J. O'Connell

1. I am an attorney duly licensed to practice before state and federal courts in the State of Delaware, as well as the Third Circuit Court of Appeals and the United States Supreme Court. I began the practice of law here in Delaware in 1984, and my primary area of representation became criminal defense in 1989, when I became a court-appointed conflict lawyer for the Superior Court. In that capacity, I began handling felony cases on behalf of indigent defendants including the trial, appeal and post-conviction review of capital cases. Over the next sixteen years I represented dozens of indigent clients facing capital murder charges at trial, on appeal and on state and federal post-conviction review. In September of 2005, I became an assistant public defender in what is now known as the Office of Defense Services here in Delaware. As an assistant public defender, I have represented several clients charged with capital murder over the last twelve years.

2. I have been asked to describe Delaware's funding mechanism for independent experts, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Delaware Office of the Public Defender already had a system and a budget in place for the retention of expert witnesses, including mental health experts, at the time of the *Ake* decision. In the case of court-appointed counsel, our practice was to apply to

the judge assigned to the particular case for the funds necessary to retain expert assistance, including mental health experts. Throughout the time that I handled capital cases (from 1990-2005) as a court-appointed lawyer, so long as I made a showing of sufficient need, no Superior Court judge ever denied me the funds necessary to hire an independent mental health expert to assist my client in the guilt or penalty phases of a capital trial. I have conferred with another colleague, Jerome Capone, Esquire, who also handfed court-appointed conflict cases here in Delaware post-1985. Like my experience in capital cases, Mr. Capone cannot recall ever being denied the resources necessary to hire independent mental health experts in a capital case.

3. In summary, it is my and Mr. Capone's experience, that the State of Delaware consistently provided counsel for indigent defendants the funding necessary for the retention of independent expert assistance, including mental health experts, in capital cases since the Supreme Court's decision in *Ake v. Oklahoma*.

I make this declaration, under the penalty of perjury under the laws of the State of Delaware and the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 1st day of March, 2017.

/s/ _____
Kevin .J. O'Connell

APPENDIX K — DECLARATION OF JAMES S. THOMSON, DATED MARCH 1, 2017

DECLARATION

James S. Thomson

My name is James S. Thomson. I am a licensed attorney in the State of California. My office address is 819 Delaware Street, Berkeley, California, 94710. I was admitted to the California Bar in 1978 and have practiced law continuously since then.

Throughout my career, I have represented individuals charged with crime. The vast majority of my clients have been indigent. While most of my legal work has been performed throughout the State of California, I have also represented clients in state and federal courts in Arizona, Florida, Montana, Nevada, Tennessee, and the Territory of America Samoa.

For much of my career, I have represented clients charged with capital crimes in state and federal trial courts, and also on appeal and in state and federal habeas proceedings as well as in clemency matters. I first represented a capital client in 1981. I have represented eleven defendants charged with federal capital crimes in several jurisdictions.

During my career, I have served on state and county bar association committees to improve the quality of indigent defense representation. In 1992, I co-founded

the Bryan R. Schechmeister Death Penalty College at Santa Clara University. This program offers a one-week intensive training for capital trial attorneys. I have served on its faculty ever since, contributed articles to capital defense training manuals in California and Arizona, and lectured at continuing legal educational programs for California Attorneys for Criminal Justice and the California Public Defenders Association.

In every capital case I have handled in the trial court, my clients have been indigent. In each, I have had to request that the court authorize funds for the retention of expert and ancillary services. I am familiar with all the court rules, statutes and state and federal case law that govern the provision of funds for expert services in both capital and non-capital cases in California, and with the actual court practices in Alameda, Merced, Placer, Sacramento, San Joaquin, Sierra, Siskiyou, and Yolo counties, and I am familiar with the practice in a number of other counties.

I have reviewed the Declaration of Russell Stetler that sets forth the policies and practices for capital defendants in California to secure expert funding in the 1980s and 1990's. Mr. Stetler's declaration both comprehensively and accurately sets forth those policies and practices.

Throughout this period, so long as the defense was able to make an adequate showing of need for an expert, investigator or other ancillary services, the defense would receive funding so it could secure the services of an independent expert. For example, I have secured

court funding for psychologists, neuropsychologists, psychiatrists, criminalists, pathologists, anthropologists, sociologists, demographers, investigators, mitigation specialists, medical doctors, fingerprint examiners, ballistic personnel, crime scene reconstructionists, toxicologists, substance use and abuse experts, social historians, eyewitness identification experts, gunshot residue experts, statisticians, social psychologists and sentencing consultants.

I affirm the foregoing it truthful and accurate.

/s/_____3/1/17
JAMES THOMSON

APPENDIX L — DECLARATION OF NATMAN SCHAYE, DATED MARCH 1, 2017

Declaration of Natman Schaye

I, Natman Schaye, under penalty of perjury, declare the following to be true and accurate to the best of my knowledge, information and belief:

1. I am a lawyer and have been licensed to practice in the State of Arizona since 1981. I am also licensed to practice in the United State District Court for the District of Arizona, the United States Courts of Appeal for the Ninth and Tenth Circuits, and the United States Supreme Court. I have practiced law full-time since 1981. My practice has almost entirely focused on the defense of criminal cases. I have represented clients facing the death penalty since 1984. Since then, my practice has primarily involved the trial, appeal and post-conviction representation of clients in capital cases. I am a charter and life member of the Arizona Attorneys for Criminal Justice, a non-profit association of criminal defense lawyers and other members of the criminal defense community founded in 1986. Since 1987, I have taught a variety of topics, including obtaining necessary resources, working with experts, and providing effective assistance of counsel, at death penalty defense seminars in Arizona and throughout the United States.

2. I was in private practice from 1981 to 2010. Since April 1, 2010, I have worked full-time as Senior Trial Counsel for the Arizona Capital Representation Project,

a non-profit devoted to ensuring that all persons facing the death penalty in the State of Arizona are vigorously and effectively represented, and are treated fairly by the courts. In this capacity, I provide direct representation to capital clients, as well as consultation and training for capital defense teams in the State of Arizona.

3. I served on the following committees by appointment of the Arizona Supreme Court: a) the committee charged with revising Rule 32 of Criminal Procedure (which governs post-conviction proceedings) from 1996-1997; b) the Committee on the Appointment of Counsel in Capital Cases from 1996-2002; c) the Arizona Criminal Rules Committee from 1995-2000; d) the Capital Case Oversight Committee from 2013-present; and e) the Task Force on the Arizona Rules of Criminal Procedure from 2015-present.

4. I am familiar with the standards and procedures for the appointment of defense experts for indigent defendants, including mental health experts, in the State of Arizona from 1981 to the present. My familiarity is based on my own law practice, the experiences described above, and from having consulted with and trained may defense lawyers in Arizona, and from having worked and spoken with Arizona's judges and justices.

5. I was asked to describe the manner in which Arizona provided funding for independent experts for indigent defendants, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). For more than sixty years, the State of Arizona has placed the

burden of funding indigent defense in felony cases on its fifteen counties. *State v. Apelt*, 176 Ariz., 349, 365 (1993); *State v. Knapp*, 114 Ariz. 531, 539 n.2 (1977); A.R.S. § 13-4013; A.R.S. § 13-1673(B) (1956). Both before and after *Ake*, county public defender offices had their own budgets, this enabling the retention of independent defense experts without court authorization. Before and after *Ake*, private lawyers representing indigent defendants under court appointment were required to obtain funding for independent experts from trial courts. Such funding was provided only if the court found it to be "reasonable necessary adequately to present [a] defense at trial ..." A.R.S. § 13-1673(B) (1956).

6. While this system was in place when *Ake* was decided, that decision caused the Arizona Supreme Court to more carefully consider indigent defendants' claims that they were constitutionally entitled to expert assistance. In *State v. Vickers*, 159 Ariz. 532, 536-537 (1989), that court quoted and applied the three factors set forth in *Ake*:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be proved. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 536, *quoting Ake*, 470 U.S. at 77. Further, it became common for Arizona state court litigators and judges

to refer to motions for funds to retain independent defense experts as "*Ake* motions." In cases in which private appointed counsel requested independent expert assistance, funds would be proved upon a showing that such assistance was "reasonable necessary." *State v. Williams*, 166 Ariz. 132, 139 (1987), *citing Ake.*

Dated this 1st day of March, 2017.

/s/_____
Natman Schaye

APPENDIX M — DECLARATION OF SAMUEL STRETTON, DATED MARCH 1, 2017

DECLARATION

My name is Samuel Stretton. I am a licensed attorney in the State of Pennsylvania. I have been a member of the Bar of the State of Pennsylvania since 1973. I am a member of the bar of the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit. For the past 35 years. I have maintained a statewide law practice with my main office being in West Chester, Pennsylvania.

During my entire career as an attorney, I have represented persons charged with criminal offenses, many through appointment by the state trial courts and many as private clients. During the 1980's through the 1990's, I represented more than two dozen indigent defendants charged with capital crimes in Philadelphia and other courts. The District Attorney of Philadelphia at that time, Lynn Abraham, sought the death penalty in nearly all aggravated murder cases. Other private attorneys who represented capitally-charged indigent defendants were Gary Server, Esquire, David Rudenstein, Esquire, Jules Epstein, Esquire, Mark Wallace, Esquire and others.

During this time, indigent capital defendants received their lawyers through appointment by the trial judge. Several Philadelphia judges kept my name on their list of attorneys to be appointed in these serious cases.

Appendix M

One of the many responsibilities appointed capital trial counsel must deal with is seeking necessary resources for an effective defense. In the early 1980's, most of the trial judges were very tough on funds motions. This reluctance to provide resources was altered after the announcement of *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* made clear that upon a sufficient showing of need, the defense was entitled to receive funds to retain competent and independent expert services. Even then it was difficult to get enough funds. The court system often would cut the fees of experts making it difficult to get them to continue to do court appointed work.

In the numerous cases I handled in the seven years after *Ake*, the problems I encountered concerned mostly the amount of funding provided for approved expert services. Often, the low amount made it difficult to find an expert willing to work for what was often an insufficient fee. But in my cases, and other capital cases handled by other private attorneys, once the court determined an adequate showing had been made to require access to expert services, those services were always independent of the prosecution. Indeed, in my cases that required mental health expertize, I would often hire Dr. Gerald Cooke, Dr. Robert Sadoff or Dr. Stephen Samuel. There was only one case, *Commonwealth v. Anthony Reid*, where Judge Sabo refused me money for an expert witness and told me to use the court staff psychologist. I refused to do so.

I affirm the truth and accuracy of the foregoing.

/s/_____ Dated: March 1, 2017

APPENDIX N — DECLARATION OF J. MICHAEL ENGLE, DATED MARCH 1, 2017

STATE OF TENNESSEE
COUNTY OF DAVIDSON

DECLARATION

I, J. Michael Engle, make oath and say that the following content is true and correct to the best for my knowledge, information and belief:

1. I am an attorney, continuously licensed by the State of Tennessee since 1976 and currently in good standing. From 1978 until 1980 and from 1990 until 2016, I was employed by the Metropolitan Nashville-Davidson County Public Defender. Except for the first nine months, I served as a supervising attorney in the felony trial courts. I am certified as a specialist in Criminal Trial Advocacy by the National Board of Trial Advocacy. I meet the standards of the Tennessee Supreme Court for lead representation in death penalty trials of which I have done four to verdict and more that were resolved before trial.

2. I utter this Declaration to address the availability of independent expert assistance in capital cases in the Davidson County court system in the 1980s, and particularly after *Ake v. Oklahoma,* 470 U.S. 68 (1985) was handed down.

3. The Metro Public Defender, a local agency, has never had independent resources to obtain expert assistance in

their representations. In the death penalty cases in early 1990s, the process to obtain assistance of an independent mental health expert was much as it is today.

4. The process to obtain an independent expert on a client's mental health began with an *ex parte* showing to the trial judge by detailed motion under seal. The Motion would detail the specific need and its relation to the facts of the case. The proposed expert's credentials would be appended, often with the proposed expert's affidavit as to why their assistance would/could be helpful. If the proposed rate was unusual or if the expert was located more than one hundred and fifty miles from the trial court, an additional showing would need to address those variances. The Motion would be heard *ex parte* in chambers and, if granted, an Order would issue under seal. This process was followed in capital cases, and experts were always independent.

5. The trial court Order would be transmitted to the Administrative Office of the Courts, Tennessee Supreme Court. Upon their endorsement, the services could begin. If approval was denied, an administrative appeal would be reviewed by the Chief Justice. Upon completion of the services, the mental health expert would invoice the attorney and, upon the attorney's endorsement, the Administrative Office of the Courts would eventually issue payment to the expert.

6. I used this process many times in 1991 in cases when a mental health expert was needed.

And, further, I say not.

/s/ _____
J. Michael Engle

Sworn to and subscribed before me on the 1st day of March, 2017

/s/ _____
Notary Public

APPENDIX O — DECLARATION OF MARCIA A. MORRISSEY, DATED FEBRUARY 28, 2017

DECLARATION OF MARCIA A. MORRISSEY

I, Marcia A. Morrissey, declare as follows:

1. I am a lawyer licensed to practice since 1975. I have devoted my career to the practice of criminal defense. For the past 30 years, my practice has been almost exclusively capital cases, in state and federal court and at the trial and post-conviction stages of the proceedings. I have tried six capital cases to juries. I have been appointed as "learned counsel" (18 U.S.C. § 3005) in ten federal death penalty cases. I have been counsel of record in eight 28 U.S.C. § 2254 cases challenging state court death judgments. I represented Angela Johnson in 28 U.S.C. § 2255 proceedings in the Northern District of Iowa, Case No. C 09-3064-MWB. After Ms. Johnson's death sentence was reversed by the district court, I was appointed to represent her at the retrial of the penalty phase of her case, and which did not occur because the government withdrew its Notice of Intent to Seek the Death Penalty.

2. I have provided declarations and expert testimony regarding the standard of care in capital cases, and I have served on the planning committee or faculty of death penalty defense training programs at least once a year for the past 28 years. I served on the Los Angeles County Bar Association Indigent Criminal Defense Appointments Committee from 1990 to 1993. In that capacity, I worked with judges and other attorneys to develop criteria,

evaluate and classify hundreds of private attorneys for appointment to criminal cases. I currently serve on the Capital Habeas Attorney Panel Advisory Committee for the Central District of California. This Committee, which consists of district court judges and attorneys, is responsible for evaluating and approving private attorneys for appointment to represent state court prisoners under a sentence of death in habeas corpus proceedings in the Central District of California.

3. For more than 30 years, I have been a member and officer of California Attorneys for Criminal Justice (CACJ). CACJ is a non-profit California corporation that currently has approximately 2,000 members, primarily criminal defense attorneys practicing before state and federal courts. In 1998, I was President of CACJ. Before serving as President, I served as President-Elect, Vice President, Treasurer and Secretary. I co-chaired the CACJ Death Penalty Committee from 1994 to 1996, and in 2005 and 2006.

4. I have lectured on issues related to criminal defense at continuing legal education conferences and seminars, including the annual CACJ and CPDA Capital Case Defense Seminar and the Bryan R. Shechrneister Death Penalty College in Santa Clara, California. In 1992 and 1993, I was Chair of the CACJ Capital Case Defense Seminar Planning Committee. I was Co-Chair of the Planning Committee for the Seminar in 2006.

5. I have consulted with attorneys in over 150 murder cases, on a wide variety of issues involving competence,

sanity, guilty and penalty phase and appellate and post-conviction issues. These topics include the selection of defenses, plea negotiations, working with investigators, experts and other witnesses, the development and presentation of statutory and constitutional issues, and other litigation questions.

6. I have been asked to address the practices regarding the provision of experts and ancillary services reasonably necessary to the development and presentation of a defense in death penalty cases in the trial courts of California in the 1980' and 1990's.

7. Because the great majority of the defendants I have represented in capital cases at the trial level have been indigent, the defense was funded by the trial court. In California, funding for capital cases is provided pursuant to California Penal Code Section 987.9 In order to obtain funding, the defense is required to make a showing that the services requested and reasonably necessary for the preparation and presentation of a defense. All funding applications pursuant to the state statute are confidential. In addition, applications for appointment of experts and investigators in capital cases are not heard by the trial judge, but by judge designated by the Presiding Judge of the Criminal Division of the Superior Court to review and rule on such applications in all capital cases.

8. Ancillary services provided to the defense in capital cases include investigative and paralegal services, mitigation specialists and a variety of experts, the nature of which varies from case to case. For example, I have

sought and obtained the appointment of jury consultants, polling and expert assistance for a change of venue motion, psychologists, psychiatrists, neuropsychologists, experts to conduct neurological evaluations, including PET scans, MRIs and functional MRIs, CT scans and sleep studies, crime scene reconstruction experts, forensic pathologists, pediatric forensic pathologists, toxicologists, criminalists, fingerprint and handwriting examiners, social historians and substance abuse experts.

9. I have read the Declaration of Russell Stetler regarding the practices and policies for funding capital cases in California in the 1980's and 1990's. Mr. Stetler has accurately described the applicable practice and procedure during this period of time.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was dated this 28th day of February, 2017, at Santa Monica, California.

/s/_____
Marcia A. Morrissey

APPENDIX P — AFFIDAVIT OF CAREY HAUGHWOUT, DATED FEBRUARY 28, 2017

AFFIDAVIT OF CAREY HAUGHWOUT

Carey Haughwout, having been duly sworn, deposes and says:

1. I am the elected Public Defender of the Fifteenth Judicial Circuit of the State of Florida, now serving my fifth term. I took office in January of 2001. I have been a member of The Florida Bar since 1983. I am a board certified criminal trial lawyer and meet the qualifications for handling death penalty cases in Florida.

2. I have practiced criminal defense for over 33 years. I handled my first capital case in 1986 and have represented people charged with capital crimes since that time. I worked in the capital division of the Palm Beach County Public Defender's Office from 1987-90, spent a decade in private practice in West Palm Beach during which time I handled numerous capital cases, and since being elected Public Defender have continued to actively represent indigent persons accused of capital crimes.

3. Over the course of my career I have handled in excess of 50 death penalty cases, I have tried approximately 20 such cases, and I have represented death sentenced individuals in the Florida Supreme Court. I have handled death penalty cases in a number of jurisdictions in Florida. I have also testified as an expert in death penalty litigation in several post-conviction cases. I currently represent

in the trial court several clients in capital cases and I provide direct oversight to our capital division that has the responsibility for more than 25 cases where the State has announced its intention to seek the death penalty if there is a conviction of a capital offense.

4. As an advocate for the indigent accused, I have worked with many organizations throughout the State of Florida. I am a member of the Palm Beach County, state and national Association of Criminal Defense Lawyers, the Palm Beach County Criminal Justice Commission, Legal Aid Society and the Florida Association of Women Lawyers. I have spoken at numerous seminars specializing in capital defense as well as state and national conferences on various criminal defense topics.

5. I served at the request of Governor Chiles and Governor Bush on the Domestic Violence Clemency Panel and served at the request of the Supreme Court on the Special Advisory Committee to Establish Minimum Standards for Counsel in Capital Cases. I have been recognized with the ACLU Harriet S. Glasner Freedom Award, The Lord's Place Ending Homelessness Award, the Voter's Coalition of Palm Beach County, the March of Dimes Women of Distinction Award, the Palm Beach County Bar Association's Professionalism Award, the Legal Aid Society Pro Bono Award for Criminal Law service, and the Judge Barry M. Cohen "Champion of Justice" Award.

6. I am very familiar with the standards of practice for criminal defense in the 1980's after *Ake v. Oklahoma*

and to the present. Since the late 1980's it has been the accepted and expected practice in the defense of capital cases to obtain independent experts to assist the defense in exploring and presenting mental health mitigation in death penalty proceedings. Upon request, trial judges in the State of Florida have routinely entered orders authorizing funds for independent experts in cases where the defense had satisfied the *Ake* requirement that mental health would be a significant issue at the sentencing hearing.

FURTHER AFFIANT SAYETH NOT.

/s/_____
CAREY HAUGHWOUT

Sworn to and subscribed before this 28th day of February, 2017, by Carey Haughwout who is personally known to me or who provided the following identification: _____

APPENDIX Q — DECLARATION OF GARY CHRISTOPHER, DATED FEBRUARY 28, 2017

DECLARATION OF GARY CHRISTOPHER

1) I am an attorney duly licensed to practice before the state and federal courts in the State of Maryland.

2) The Maryland Office of the Public Defender ("the Office") was and is an independent State Agency within the Executive Branch of State government. It has statewide authority to assure the delivery of legal defense services in criminal cases. It is headed by a Chief Public Defender who is appointed by a Board. The Office is provided with an annual budget intended to cover all operational expenses The Capital Defense Division is headed by an Assistant Public Defender who answers to the Chief Defender. I was appointed to serve as the Chief Attorney of the Capital Defense Division of the Office in the Spring of 1984, and I served in that capacity until August of 1989.

3) The Capital Defense Division is a statewide unit responsible for providing guidance, support, instruction, and litigation resources for all Office of the Public Defender and panel cases across the State of Maryland in which the prosecution sought the death penalty.

3) My responsibilities as Chief of the Capital Defense Division included oversight and administration of the public defender's budget with regard to the litigation of capital cases. This responsibility necessarily included the authorization of expenditures for the retention and funding of expert witnesses.

4) I have been asked to describe Maryland's funding mechanism in capital cases for the retention of independent expert witnesses, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

5) *Ake* had no substantial effect on the way in which the Maryland Public Defender's Office selected, utilized, and compensated expert witnesses in capital cases. The Agency already had a system in place for the retention and funding of independent expert witness at the time *Ake v. Oklahoma* was decided. The Public Defender was responsible for administering the budget to effectively perform its function of zealous representation of indigent defendants charged with criminal offenses, including the management of case-related expenses, such as the retention and funding of independent expert witnesses.

The Office of the Public Defender was not required to seek approval from the judiciary, the executive, or any other authority in order to retain and fund the independent expert witnesses utilized in its cases. Funds for these expenses were committed on a case-by-case basis based upon a determination by the Public Defender, or his designee, that the expense was reasonably necessary to assure zealous representation on behalf of the individual client. In making this determination, I regularly consulted the Chief Public Defender regarding expert appointments. In every case I can recall the Chief Defender deferred to my judgment on the subject of retaining experts for a given case.

6) In my capacity as Chief of the Capital Defense Division, with the authorization and approval of the Public Defender, and in consultation with the attorneys providing

direct representation to the client, I exercised the authority to retain and fund experts in capital cases. This included all mental health experts, forensic experts, and social work and mitigation experts. Upon my determination that the expense of retaining a suitable expert was reasonably necessary to assure zealous representation of the capital client, the expert would be appointed.

7) I left my position as Chief of the Capital Defense Division in 1989, though I continued to serve as an Assistant Public Defender for several years and accepted appointment in several capital cases after 1989. I can attest that the system that was in place for the approval and payment of expert expenses in capital cases during my tenure in the public defender's office after 1989 continued to be essentially unchanged.

8) In summary, Maryland was already providing for the retention and funding of independent expert assistance for indigent capital defendants prior the issuance of the United States Supreme Court's opinion in *Ake v Oklahoma* prior to 1985 and has continued at all times since then to provide for the retention and funding of independent expert witnesses when reasonably necessary to ensure zealous representation in all capital cases.

I declare under the penalty of perjury under the laws of the State of Maryland and the United States that the foregoing is true and correct.

Dated this 28th day of February, 2017.

/s/_____

Gary Christopher

APPENDIX R — DECLARATION OF MARK H. DONATELLI, DATED FEBRUARY 27, 2017

DECLARATION OF MARK H. DONATELLI

I, Mark H. Donatelli, hereby state and declare as follows:

1. I am an attorney licensed to practice law in the State of New Mexico. I am also licensed in federal court in New Mexico and the Tenth Circuit Court of Appeals. I have specialized in the representation of persons in criminal matters since 1976 and I have represented clients facing the death penalty since 1980. I have been a member of the Federal Death Penalty Resource Counsel Project since 2007.

2. I served as a public defender from 1976 to 1983. Between 1980 and 1983, I was the New Mexico Prison Riot Defense Director responsible for providing representation to all targets of capital prosecutions stemming from the 1980 New Mexico Prison Riot. I have been in private practice since 1983 and have represented capital defendants in State and Federal Courts.

3. My responsibilities as Prison Riot Defense Director included administration of funding for expert witnesses.

4. I have been asked to describe New Mexico's funding mechanism for independent experts including mental

health experts in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). Beginning in 1980 the New Mexico Public Defender system established a system for independent expert witnesses and defense litigation expenses pursuant to the New Mexico Indigent Defense Act, NMSA 1978, Sections 31-16-1 through 31-16-10. The New Mexico Public Defender department created its own capital defense unit which received appropriations for its expert witnesses as deemed necessary by counsel. Private counsel who may have been appointed to capital cases were provided fees for expert witnesses directly from the Chief Public Defender. Any dispute between private counsel and the Chief Public Defender over expert witness fees would be resolved *ex parte* by a district court but always with the result that the Public Defender Department provide fees for expert witnesses as deemed necessary by counsel.

5. After I entered private practice in 1983, I continued to assist private attorneys and public defender attorneys with capital cases. I can attest that the system that was in place for the approval and payment of expert and other extraordinary expenses during my tenure in the public defender's office continues to be the process for requesting, approving, and paying for such expenses for indigent defendants in New Mexico.

6. In summary, New Mexico was already enforcing a right to funds for expert assistance for indigent defendants when *Ake v. Oklahoma* held that the due process clause of the 14th Amendment requires that indigent defendants be provided an independent

mental health expert when reasonably necessary to an issue in any case. *Ake* elevated this obligation to a constitutional imperative and confirmed the procedure that was already in place and being followed in criminal cases.

I declare under penalty of perjury under the laws of the State of New Mexico and the United States that the foregoing is true and correct.

DATED: February 27, 2017

By /s/_____
MARK H. DONATELLI

APPENDIX S — DECLARATION OF KATHRYN ROSS, DATED FEBRUARY 27, 2017

DECLARATION OF KATHRYN ROSS

I am an attorney in Washington State. I was admitted to the Washington State Bar in 1976. I am also admitted to practice in Eastern and Western Districts of Washington, District of Montana, the Ninth Circuit Court of Appeals and the United States Supreme Court.

My practice has been either exclusively criminal defense or including criminal defense for my entire career. I have represented individuals facing the death penalty at trial or in post-conviction proceedings since 1978.

Starting in the 1980s, capital defense trial attorneys throughout Washington State met regularly, usually every other month, to discuss their pending death penalty cases. The meetings and communications among capital defense counsel was under the auspices of the Washington Association of Criminal Defense Lawyers (WACDL). I served two separate three year terms as chair or co-chair of the WACDL Death Penalty Committee. In addition, from 2005 to 2015 I was the Director of the Washington Death Penalty Assistance Center (DPAC).

Both the WACDL Death Penalty Committee and DPAC monitored every aggravated murder trial in the state and kept in communication with trial counsel.

Appendix S

I have been asked to address whether capital defendants in Washington, upon a sufficient showing of need, have been provided funds for independent mental health experts for the defense since *Ake v. Oklahoma*, 470 U.S. 68 (1985). The answer is "yes." Even before the *Ake* decision was announced, capital defendants in Washington were granted funding for mental health experts. Defense counsel selected the experts. The first capital trial I worked on, as a public defender in Snohomish County, WA., was *State v. Nicky Kirby* in 1978. In that case we were granted funds to secure a psychologist for the defense. At that time the defense was required to bring a motion for funding in open court and the prosecution was permitted to oppose the funding. However, even then, I was unaware of any capital defendant being required to accept evaluation at a state hospital in lieu of a separate defense expert.

After publication of *Ake*, the practice in Washington improved for defendants as defense counsel were allowed to submit expert services requests *ex parte* and the amount of funding increased. I can personally attest to the practice in the early post-*Ake* era as I was lead counsel in the case of *State v. Hutchinson* in rural Island County starting in 1987. The defense in that case was allowed to present motions for expert funding *ex parte* to the trial judge. We were granted funds for three mental state experts, a psychologist, a neuro-psychologist, and a neuropharmacologist. In the *Hutchinson* case, the trial court was following the already established practice of granting funds for mental health experts selected by the defense. See: *State v. Poulsen*, 45 Wash App 706, 726 P2nd 1036 (1986).

Appendix S

There is no question that in Washington State defendants in capital cases at trial, on sufficient showing of need, were granted funding for independent mental health experts before and after the publication of *Ake v. Oklahoma*.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: February 27, 2017, at Seattle, Washington.

/s/_____
Kathryn Ross WSBA No. 6894

APPENDIX T — DECLARATION OF DAVID A. RUHNKE, DATED FEBRUARY 26, 2017

DECLARATION OF DAVID A. RUHNKE

I, David A. Ruhnke, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an attorney at law in private practice with offices in Montclair, New Jersey and New York City. I am admitted to practice in the States of New York and New Jersey, the United States District Courts for the Eastern and Southern Districts of New York, the District of New Jersey, the United States Court of Appeals for the First, Second, Third, Eighth and Tenth Circuits, and the United States Supreme Court. I serve on the Criminal Justice Act panels in the Southern and Eastern Districts of New York and the District of New Jersey. From 1976-1983, I was an Assistant Federal Public Defender for the District of New Jersey.

2. Since 1983 a substantial part of my practice has been devoted to the defense of capital murder cases. I have personally tried 17 such cases to a final resolution before juries in the State of New Jersey (six such cases) and various United States District Courts (11 such cases). I have also represented capital defendants in state and federal appeals and in state and federal post-conviction proceedings and have settled, short of trial, dozens of potentially capital cases. I am a member of the Federal Death Penalty Resource Counsel Project (and have been for nine years), an organization funded by the Office of

Defender Services of the Administrative Office of the United States Courts to advise attorneys handling federal capital cases around the country. I lecture frequently on the topic of capital defense and have been qualified to testify as an expert on the defense of capital cases in several state and federal courts.

3. I have been asked to discuss the impact of the Supreme Court's 1985 *Ake v. Oklahoma* decision on the practice of capital defense in the State of New Jersey. New Jersey enacted a post-*Gregg* capital punishment scheme in 1981. In 2007 the state legislature repealed the statute and New Jersey no longer has a death penalty. During those 26 years, I represented numerus defendants facing capital punishment in the state courts of the State of New Jersey and am very familiar with the prevailing practices.

4. At the time *Ake* was decided, New Jersey had an existing and well-funded statewide Public Defender system that was responsible, *inter alia*, for the funding of expert services in cases handled by staff public defenders and private attorneys who took public defender cases on an assigned basis. When the death penalty was re-enacted in 1981, the Public Defender fully funded requests in those cases for independent experts, specifically in the area of mental health but also in the many other areas where expert or investigative assistance was deemed appropriate. The judiciary was not involved in this funding[1]

1. By caselaw, the Public Defender is also required to fund investigative and expert resources even in cases where a defendant has a privately retained lawyer so long as the showing is made that the services are necessary and the defendant lacks the ability

since it was handled as an administrative matter within the Public Defender's office. That funding never flagged during the 26 years of death penalty litigation from 1981 to 2007. During that period, I personally handled at least 15 such cases and I never recall a funding request for an independent expert being denied. Experts were paid substantial fees and were paid promptly.

5. As footnote 4 in *Ake* recognized, a substantial number of states appeared at that time to provide for independent expert services to indigent defendants upon an adequate showing of need. At the time of the *Ake* decision, in both capital and non-capital cases, New Jersey was already in compliance with *Ake*'s due process rule requiring provision of independent expert services.

I hereby declare under penalty of perjury that the forgoing is true and correct.

/s/ _____
David A. Ruhnke

Dated: Montclair, New Jersey
February 26, 2017

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to fund those services. *See, e.g., In re Cannady*, 126 N.J. 486, 600 A.2d 459, 1991 N.J. LEXIS 827 (N.J. 1991).

APPENDIX U — DECLARATION OF DAVID D. WYMORE, DATED FEBRUARY 25, 2017

DECLARATION OF DAVID D. WYMORE

1. I am an attorney licensed to practice in the state and federal courts of the State of Colorado since 1976. I have specialized in the practice or criminal law since 1976. I became a deputy Public Defender for the statewide public defender office in 1976. I was Office Head of the Ft. Collins Regional Office from 1980 to 1982.

2. In the 1982, I was appointed as the Chief Trial Deputy Defender for the Colorado State Public Defender. In addition, hiring and training of new and seasoned lawyers and administrative duties arising from a statewide office, as Chief Trial Deputy I was directly responsible for capital litigation in our statewide office. I continued as Chief Deputy Public Defender until my retirement in 2004. In my 22 years as Chief Deputy. I was involved in approximately 80 capital cases arising in all regions of the State of Colorado.

3. In 2004, I entered private practice in Boulder. Colorado. Throughout my tenure as Chief Deputy Public Defender I, along with my colleagues in the Colorado Public Defender system, developed a *voir dire* system that is commonly referred to as *The Colorado Method of Capital Voir Dire.* I founded and am the excusive director of the *National College of Capitol Voir Dire (neevd.org)* presently operating out of the University of Colorado Wolf Law School. I continue to train and advise in capital

cases throughout the United States, including the recent capital trial in Colorado, *People of the State of Colorado vs. James Holmes.*

4. The Colorado statute establishing the statewide public defender provides in part:

> The general assembly hereby declares that the state public defender at all times shall ... provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association standards relating to the administration of criminal justice, the defense function.

C.R.S.§ 21-1-101 (2016).

5. At all times during my tenure as Chief Deputy, funds for experts were part of the annual budget submitted by the State Public Defender and then granted by the legislature. Anticipated costs of defense of capital cases, specifically expert services, were made part of the annual budget request.

6. Presently and since 1996 indigents not eligible for representation by the State Public Defender due to conflicts of interest are represented by private counsel paid by the Office of Alternate Defense Counsel. the statute establishing that office uses language identical

to that quoted above in giving those accused of crimes the right to representation "commensurate with those available to nonindigents." C.R.S. 21-2-101 (2016). That Office has funded defense counsel in a significant number of capital cases, and I am unaware of any significant dispute arising from the denial of funds for experts.

7. The Colorado Supreme Court has also issued directives allowing for the Judicial Department itself to pay for expert assistance for indigent defendants under certain circumstances. *See People v. Stroud,* 2014 COA 58, 356 P.3d.

8. Colorado's courts have long recognized that effective assistance of defense counsel will frequently require the assistance of experts. *Hutchinson v. People,* 742 P.2d 875, 880 (Colo. 1987); *Lanari v. People.* 827 P.2d 495 (Colo. 1992). *E.g.:*

> Psychiatric consultation is, in may cases one of the "raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77, 84 L.Ed. 2d 53, 105 S. Ct. 1087 (1985), and psychiatry has come to play a "pivotal role" in criminal proceedings where the defendant's mental condition is in issue. *Id.* at 79.

Miller v. District Court, 737 P.2d 834, 839 (Colo. 1987) quoting *Ake* at length thereafter).

9. I am unaware of any published case other than the aforementioned *Stroud* decision where the issue of a failure

of the State or court to pay for expert assistance has arisen in Colorado. I believe because of this recognition of and attention to the important matter of expert assistance for effective assistance of counsel. I am unaware of any substantial dispute arising in a capital case in Colorado regarding the provision of independent expert assistance in such cases.

10. My responsibilities as Chief Deputy regarding capital cases included lawyer staffing, lawyer training, investigator, assignment, mitigation preparation, motions practice, instructions, paralegal assistance, case analysis for both innocence/guilt phase and penalty phase as well as jury selection and expert retention.

11. I have retained independent expert assistance for capital cases either for use in defense case in chief, to rebut prosecution evidence or for purposes of mitigation, in the following illustrative areas:

Mental Health or Mitigation:

Psychiatry, psychology, clinical psychology, psychological testing, neuropsychology, child psychology, child educational development, child abuse syndrome, battered woman syndrome, PTSD, trauma, learning disabilities, failure to thrive syndrome, intellectual disabilities both cognitive and adaptive, sexual homicide, pedophilia, fetal alcohol syndrome, drug addiction, alcohol addiction, toxicology, false confessions, eyewitness testimony experts, sex offender evaluators and treatment, childhood abandonment, psychopharmacology, mitigation specialists,

sociologists, social workers, mental health workers, prison security experts, prison adjustment experts.

Forensic Sciences:

Pathology, ballistics, firearm identification, terminal ballistics, gunshot residue, bullet composition, wound identification, deadly force, human bite marks, hair and fiber identification, human factors involved with firearms, dog trading, dog drug identification, arson investigation, tool mark identification, fingerprint identification, voice recognition, audio and visual experts, surveillance experts, cell phone trading and retention, serum blood markers, blood marker, crime scene reconstruction, footwear impressions, footwear identification, forensic podiatry, rope and knot experts, tire impressions, automotive experts, accident reconstruction, computer experts, police procedure, DNA, statistics, forensic accounting, gang recognition, gang membership, polygraphs, security systems, sexual assault syndrome, forensic entomology, forensic anthropology, handwriting, criminal profiting,

Jury Trial Issues:

Jury Selection experts, venue pollsters, CAD experts

12. As the Chief Deputy I was directly responsible for approving, retaining and validating payment for experts from the Public Defender annual budget which were then paid for by our administrative officer. The ability to retain the necessary expert assistance independently and of high repute is, I believe, the most salient factor in the

non-death sentences in all the 80 capital cases during my tenure. The retention of independent expert assistance also resulted in 3 innocent persons tried for capital crimes being acquitted by juries.

13. I personally tried two capital cases post-*Ake v. Oklahoma* that involved co-defendants. These co-defendants were represented by court appointed counsel. In both cases these co-defendants were provided independent, confidential expert assistance that was paid for by the State of Colorado. All co-defendants received life sentences.

14. In summary, Colorado has been exemplary both pre- and post-*Ake v. Oklahoma* in providing for independent, confidential assistance of experts to indigent defendants, in order to insure the due process rights of indigent defendants and effective assistance of counsel. The result has been protection of innocent person from conviction and death sentences.

I declare under the penalty of perjury under the laws of the State of Colorado and the United States that the foregoing is true and correct.

Dated this 25th day of February, 2017.

/s/_____
David D. Wymore

APPENDIX V — DECLARATION OF SEAN D. O'BRIEN, DATED FEBRUARY 24, 2017

Declaration of Sean D. O'Brien

1. I am an attorney duly licensed to practice before state and federal courts in the State of Missouri, the Sixth, Eighth and Tenth Circuit Courts of Appeals, and the United States Supreme Court. I have specialized in the representation of persons in criminal matters since 1981, and I have represented clients facing the death penalty since 1983. Since 1985, my primary area of criminal practice has involved the trial, appeal and post-conviction representation of individuals in capital cases. I am currently engaged as a full time tenured professor at the University of Missouri-Kansas City School of Law, where I teach criminal law and procedure and postconviction representation clinics handling cases involving capital punishment and actual innocence.

2. I served as the appointed Public Defender in the Sixteenth Judicial Circuit, Jackson County, Missouri, from October 1, 1985, to September 30, 1989. I directed an urban public defender office, which included hiring and supervising a staff of twenty-five lawyers, investigators, paralegals and secretaries. My office was responsible for all indigent defense in Jackson County, Missouri, which includes Kansas City and outlying urban areas. We were also responsible for all capital representation in the greater Kansas City area and throughout the State of Missouri as assigned. Therefore, I was counsel of record on many death penalty trial, appeal and postconviction cases during my tenure.

3. My responsibilities as Public Defender including administration of the public defender's budget, which included allocation of salaries, operation expenses, and funding for extraordinary expenses, including expert witnesses. The term "extraordinary" is an administrative description of expenses that are not part of the fixed overhead costs such as salaries, rent, equipment, office supplies and insurance. "Extraordinary" does not mean that such expenses were rare; it is used to describe litigation expenses, which has a specific meaning that was eventual codified by state regulation:

> Litigation expenses include, but are not limited to, the costs of investigation, depositions, *expert witnesses and consultants, forensic tests or examinations*, records, transcripts, et cetera, which are reasonably necessary for the presentation of a defense on behalf of, or testing of the state's case against, the indigent defendant. Attorney's fees and costs associated with support staff or office overhead do not constitute litigation expenses.

Mo. Code of State Regulations 10-4.010 (emphasis added). Although this regulation was formally promulgated in 2007, it incorporated the practice and administrative definition in use at the time I joined the Jackson County Public Defender's Office in 1981 and at all times during my tenure there.

4. I have been asked to describe Missouri's funding mechanism for independent experts, including mental

health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Missouri Public Defender System already had a system in place for independent expert witness and similar defense litigation expenses at the time *Ake* was decided as a result of the Missouri Supreme Court's decision in *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (*en banc*). Noting that "It is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees," the Missouri Supreme Court promulgated temporary guidelines to deal with funding shortages in the indigent defense system pending legislative action. With respect to expenses of litigation, the court directed:

> We know of no requirement of either law or professional ethics which requires attorneys to advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of a proper defense of the indigent accused. If after evidentiary hearing, reasonable and necessary costs ordered advanced by the court are not forthcoming and available for preparation of the proper defense of the indigent within the time required by law for the trial of the accused, § 545.780, RSMo 1978, or where the court is unable to find and appoint counsel for the indigent accused who can prepare for trial within the time required by law, the court should on proper motion where necessary to protect the constitutional rights of the accused, order discharge of the accused.

State ex rel. Wolff v. Ruddy at 67. The entity responsible for paying reasonable and necessary costs is the Missouri Public Defender Commission.

5. After *Wolff*, the Missouri General Assembly amended Missouri Revised Statutes Chapter 600 to reorganize the Public Defender System and provide for full-time defenders throughout the State of Missouri, with the authority to contract with independent counsel as needed. *See* RSMo. Sec. 600.021. Funds for extraordinary expenses were appropriated for each individual office to be allocated on a case-by-case basis based on a determination by the Public Defender that the extraordinary expenditure was reasonably necessary. For example, if one of my assistant public defenders felt that a mental health expert was reasonably necessary in a case, he or she submitted a written request form that included a description of the expense, a narrative explanation of the necessity for it, and whether reasonable alternatives were available. I would then meet with my assistant, and if after our discussion I agreed that the expense was reasonably necessary, I would authorize the expenditure. This procedure was followed for resources such as mental health experts, other forensic experts, mitigation specialists and depositions.

6. I left my position as Public Defender on September 30, 1989, to become the Director of the Missouri Capital Punishment Resource Center, where I specialized in the representation of indigent prisoners under sentence of death. In that capacity, I continued to work with the Public Defender System in specific cases, and I have continued to work with public defenders since being appointed

professor of law in September, 2005. I can attest that the system that was in place for the approval and payment of expert and other extraordinary expenses that was in place during my tenure in the public defender's office continues to be the general process for requesting, approving and paying for such expenses for indigent defendants in Missouri.

7. In summary, Missouri was already enforcing a right to funds for expert assistance for indigent defendants when *Ake v. Oklahoma* held that the Due Process Clause of the Fourteenth Amendment requires that indigent defendants be provided an independent mental health expert when reasonably necessary to an issue in the case. *Ake* elevated this obligation to a constitutional imperative and confirmed the procedure that was already in place and being followed in criminal cases.

I declare under the penalty of perjury under the laws of the State of Missouri and the United States that the foregoing is true and correct.

Dated this 24th day of February, 2017.

/s/ _____
Sean D. O'Brien

APPENDIX W — DECLARATION OF DAVID I. BRUCK, DATED FEBRUARY 24, 2017

DECLARATION OF DAVID I. BRUCK

I, David I. Bruck, declare the following to be true to the best of my knowledge and belief:

1. I am a lawyer and have specialized in the defense of death penalty cases for the last 36 of my nearly 41-year career. Prior to moving to Virginia in 2004, I spent nearly 28 years as a criminal defense practitioner in South Carolina, and for 24 of those years - between 1980 and 2004 - my practice was primarily devoted to the defense of capital cases in the state courts of South Carolina. Since 2004 I have been employed as a Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse, a resource center for lawyers defending capitally charged clients throughout Virginia. I also serve as a part-time Federal Death Penalty Resource Counsel to the federal defender system nationwide.

2. I am a 1975 graduate of the University of South Carolina School of Law, and began practicing criminal law in 1976 as an assistant public defender in Richland County (Columbia) South Carolina. I have served as a county public defender and as the statewide appellate defender in South Carolina. I have represented capital defendants at trial in some 25 cases, including *South Carolina v. Susan Smith* (1994-95), *United States v. Dzhokhar Tsamaev* (D. Mass., 2014-15), and *United States v. Dylann Roof* (D. S.C. 2015-2017). I have argued seven death penalty cases in the United States Supreme Court, including *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Simmons v. South Carolina*,

512 U.S. 154 (1994), and *Kelly v. South Carolina*, 534 U.S. 246 (2002), and have handled more than 65 capital appeals in state and lower federal courts.

3. I have testified before U.S. Congressional committees on death penalty legislation on 9 occasions, and have lectured to lawyers, state and federal judges and mental health professionals on capital sentencing issues in more than thirty states and U.S. territories. During the 1980s and 1990s, my legal education experience included several lectures at judicial workshops for South Carolina circuit (trial) judges on death penalty law and procedure. I received the John Minor Wisdom Public Service & Professionalism Award from the ABA Section of Litigation in 1996, and the Significant Contributions to Criminal Justice Award from California Attorneys for Criminal Justice in 2001. I have taught courses on the law of capital punishment at the University of South Carolina School of Law and the Washington & Lee School of Law, was the 1990 Ralph E. Shikes Visiting Fellow at Harvard Law School, and in 2002 served as Scholar in Residence at the Frances Lewis Law Center, Washington & Lee University. I have directed Washington & Lee's Virginia Capital Case Clearinghouse since mid-2004.

4. During the 1980s, while serving under contract to represent many capitally-sentenced clients of the South Carolina Office of Appellate Defense, I consulted with defense counsel in innumerable South Carolina capital cases at the pretrial and trial stages.

5. The Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), had little or no effect on South Carolina

state capital procedure or practice. This is because *Ake* had been prefigured by a subsection of South Carolina's post-*Gregg* capital sentencing statute, S.C. Code § 16-3-26(C). As originally enacted, that subsection provided:

> Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order ... payment.

1977 S.C. Act No. 177 § 3, quoted in *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). While this provision initially included relatively low maximum spending caps, the South Carolina courts recognized in the earliest post-*Gregg* cases that such spending limitations could be exceeded upon a sufficient showing of need. *State v. Goolsby*, 278 S.C. 52292 S.E.2d 180 (1980) (enforcing statutory caps on attorneys' fees and expert costs in the absence of proof of extraordinary circumstances). Well before 1985, when *Ake* was decided, South Carolina circuit courts routinely found "extraordinary circumstances" justifying payments in excess of the statutory limitations on expert and investigative expenses contained in § 16-3-26(C), and although the current "cap" on such costs has now risen to $20,000, approvals and payments in excess of this limit are still the rule rather than the exception in South Carolina cases. It is therefore unsurprising that a search of South Carolina death penalty appellate decisions does not disclose a single case in which a death-sentenced prisoner has relied on or cited *Ake* as authority to reverse

the denial of funding for defense expert or investigative services at trial.

6. Given this statutory authorization for defense counsel to "obtain" expert and investigative services upon a showing of need, the independence of defense mental health experts is an issue that has simply never arisen in South Carolina capital procedure. So far as I am aware, no South Carolina circuit court has ever required a capital defendant to rely on state-employed or state-allied mental health experts to assess the presence of possible mitigating evidence, and there are certainly no reported appellate decisions challenging a trial court's imposition of such a requirement.

7. In sum, it is my clear recollection that from the earliest years of South Carolina's post-*Gregg* capital sentencing scheme after 1977, capital defendants were entitled to -- and actually received -- the assistance of independent mental health and other experts upon a showing of necessity in *ex parte* proceedings, and that *Ake v. Oklahoma* did not change how defendants' requests for such assistance were considered and met in South Carolina capital cases.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ _____
DAVID I. BRUCK

February 24, 2017

APPENDIX X — DECLARATION OF RUSSELL STETLER, DATED FEBRUARY 23, 2017

DECLARATION OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

1. I am providing this declaration in support of the Petition for Writ of Certiorari now pending in the Supreme Court of the United States, James Edmond McWilliams, Sr., *Petitioner,* v. Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al., *Respondent,* No.16-5294. I was asked to address the policies and practices in death penalty cases in the trial courts of California regarding the provision of independent experts once such experts were deemed reasonably necessary to an adequate defense during the period prior to the finality of Mr. McWilliams's conviction in 1991. *McWilliams v. State,* 640 So. 2d 982 (Ala. Crim. App. 1991).

2. Although I address the six-year time frame from the Supreme Court's opinion in *Ake v. Oklahoma,* 470 U.S. 68 (1985), through the finality of conviction in Mr. McWilliams's case, I will refer in this declaration to a somewhat longer period in which I was working on death penalty cases (beginning in 1980), since the policies and practices of providing independent experts that were deemed reasonably necessary to an adequate capital defense in California preceded the Court's decision in *Ake.* The Court noted in *Ake* that "[m]any states, as well as the Federal Government currently make psychiatric assistance available to indigent defendants," citing, among other statutes, CAL. PENAL CODE ANN. § 987.9 (West Supp. 1984) (capital cases); right recognized in all cases in *People*

v. Worthy, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402 (1980). *Ake*, 470 U.S. at 78, nn.4-5.

3. I have been involved in the investigation of capital cases, particularly the investigation of mitigating evidence relevant to sentencing, since 1980. From 1980 to 1990, I worked in a private office in San Francisco, and from 1990 to 1991, I was the Chief Investigator at the California Appellate Project, a nonprofit law firm that assisted post-conviction counsel representing death-sentenced prisoners throughout the state. Before I joined the California Appellate Project in 1990, I personally worked on approximately one hundred homicide cases in multiple California counties between 1980 and 1990. More than two dozen were at some point capital cases. Mental health experts were consulted in most of the capital cases and many of the noncapital cases. All of these expert consultations were confidential and independent.

4. When I worked on death penalty cases in a private capacity in the 1980s, California Penal Code § 987.9 provided funding for investigators, experts, and others for the preparation or presentation of the defense, on a showing that the expenditures were reasonably necessary. Applications (and the contents of funding applications) were confidential. A "money judge," other than the trial judge, was designated to rule on the reasonableness of the request in an *in camera* hearing. These statutory provisions ensured that capital defense teams had independent experts, including the mental health experts who were ubiquitous in capital cases in the 1980s in California.

5. During the 1980s, I worked on capital cases in numerous California jurisdictions, including Alameda, Calaveras, Contra Costa, Los Angeles, Marin, Mendocino, Sacramento, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, and Stanislaus Counties. When I moved to the California Appellate Project in 1990, I worked on cases throughout the state. I am not aware of a single capital case in this period in which the trial court failed to provide an independent expert to the defense once there had been a prima facie showing that such an expert was reasonably necessary.

6. All my work on death penalty cases has been on behalf of indigent clients, either through funding authorized by courts or public defender offices, or as an employee of indigent defense agencies. After fifteen years of work in California, I served from 1995 to 2005 as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. I returned to California in 2005, and have served ever since as the National Mitigation Coordinator for the federal death penalty projects. *See* JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, 111-112, Sept. 2010 (authorization of the position to expand the availability and quality of mitigation work in death penalty cases in federal com1). *Available at:* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/

Publications/UpdateFederalDeathPenaltyCases.aspx. I have been based in Oakland California since 2005. In this capacity as National Mitigation Coordinator, I consult with lawyers, investigators, mitigation specialists, and experts in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus (under 28 U.S.C. § § 2254 and 2255). Over the years, I have been directly involved in hundreds of capital cases, including scores of trials and post-conviction hearings.

7. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases, including California's annual Capital Case Defense Seminar. I served as a co-chair of that seminar for six years and as a member of its planning committee for many more years, beginning around 1991. I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have taught at over three hundred fifty continuing legal education programs around the country (including roughly one hundred in California), as well as dozens of additional programs at law schools and related professional conferences in the United States, Europe, and Asia.

8. My publications on mitigation and mental health evidence have appeared in the California Death Penalty Defense Manual; CALIFORNIA DEFENDER, a quarterly journal published the California Public Defenders Association; THE CHAMPION, the monthly magazine of the National Association of Criminal Defense Lawyers; INDIGENT DEFENSE, published by the National Legal Aid and Defender Association; several law reviews; and

three book chapters. At the request of the UNIVERSITY OF MISSOURI KANSAS CITY LAW REVIEW, I contributed an article to their symposium issue devoted to "Death Penalty Stories," *The Unknown Story of a Motherless Child*, 77 UMKC L. REV. 94 7 (2009). This article described the case of a California defendant who was tried capitally in both Los Angeles and San Francisco, with consultations by multiple independent mental health experts.

9. I have qualified as an expert witness in death penalty cases in multiple state and federal courts in fourteen different states. I have provided opinion evidence on prevailing professional norms in California in three capital cases by live testimony:

Ronald L. Sanders v. Robert L. Ayers, Jr., United States District Court for the Eastern District of California, Case No. CIV. 1-92-54 71-LJO (proceedings under seal subject to protective order) (2008) (case tried in 1982);

Ralph International Thomas v. Robert K. Wong, United States.District Court for the Northern District of California, No. C 93-0616-MHP, Document 258, filed Sept. 9, 2009 (citing my testimony in Alameda County Superior Court reference hearing) (case tried in 1986); and

In re David Esco Welch, On Habeas Corpus, Supreme Court of California, No. S107782, Contra Costa County Superior Court reference hearing, Jan. 12, 2013 (case tried in 1989).

10. This declaration is based entirely on my own experience in California capital cases in the time frame prior to finality in Mr. McWilliams's case in 1991. However, I should also make two points. First, my experience was consistent with the practices reflected in the training materials and manuals of that time. Second, the prevailing norms and practice in the preparation of penalty phase evidence, including mitigation related to mental health evidence, may be largely invisible to appellate courts that review only the relatively small number of cases ending in death sentences. The overwhelming majority of death-eligible cases in California avoided the death penalty in the 1980s. Death eligibility in California required that prosecutors allege one or more "special circumstance" enumerated under Penal Code ¶ 190.2. The Office of the State Public Defender in California tracked all death-eligible cases from the introduction of the new death penalty statute in 1977 through December 31, 1989. That office tracked "special circumstance" cases in order to make reliable forecasts of its own appellate caseload, but subsequent funding cuts prevented tracking subsequent to 1989. *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 686 (2013). Over 90 percent of potential capital cases avoided the death penalty: 3,425 cases alleging special circumstances were filed, but only 319 death sentences were imposed statewide (9 .3 percent). *!d.* In Los Angeles, 1,711 cases were filed, with only 99 death sentences imposed (5.7 percent). *!d.*

11. Capital defense manuals and training conference materials reflected the practices of the effective teams

that litigated capital cases successfully in the 1980s. The California defense bar has two large membership organizations, California Attorneys for Criminal Justice (representing the private bar) and the California Public Defenders Association (representing public defenders). They jointly sponsored an annual Capital Case Defense Seminar, and published a trial manual, the California Death Penalty Defense Manual. The 1986 edition of this manual had a section on Penal Code § 987.9 which contained sample declarations of counsel and orders for confidential funding (prepared by attorneys Thomas J. Nolan, Jr., in a San Mateo County case in 1979 (including "psychiatric evaluation and consultation"); Leslie H. Abramson in a Los Angeles County case in 981 (including "Psychologist to evaluate defendant for penalty phase including testing and background evaluation"); and James Larson in a San Francisco County case in 1983). Although defendants' names are redacted to protect confidentiality, I recognize the order prepared by Mr. Larson because it arose in a case in which I was also involved, and the manual editor noted the unusual circumstance that Mr. Larson had been retained, rather than appointed by the court. I recall that an independent psychologist was confidentially consulted in that case. The 1988 Supplement to the 1986 Manual included further discussion of the "entitlement to defense experts" who "work confidentially and at your discretion" and the "inadequacy of state experts."

12. In the penalty phase section of the 1986 manual, there was a separate section entitled "Penalty Phase" with a memo on "Law Relating to Penalty Phase Investigation" by Michael G. Millman, executive director of the California

Appellate Project. The memo enumerated the "wide variety of purposes" for which Penal Code § 987.9 funding had been used, including psychiatrists, psychologists and psychological testing, and alcohol and drug experts. The memo also noted the availability of Penal Code § 987.9 funds even where indigent defendants were represented by retained counsel (citing *Anderson v. Justice Court,* 99 Cal.App.3d 398 (1999)) or a public defender office (citing A.G. Opinion No. 84-102).

13. I regularly attended California's annual Capital Case Defense Seminar prior to 1991, and I read the trial manuals, training materials, and other publications of the California defense bar in this period. The capital defense team's right to independent mental health experts in the development and presentation of penalty phase evidence was repeatedly stressed throughout this period, and I was not involved in, or even aware of, any case in that time frame where such independent services were denied in the trial court.

14. The state policies and practices I describe above were in place before the announcement of *Ake* and have remained in place ever since. There is no doubt, however, that Ake reinforced the necessity that expert services must be provided in those instances where the defense made out an adequate showing of need, and those services must be independent of the prosecution.

* * *

Appendix X

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and under the laws of the State of California, that the foregoing is true and correct and was executed this 23rd day of February at Oakland, California.

/s/ _____
RUSSELL STETLER